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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 111.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANT,

vs.

M. J. BRAY, M. J. BRAY, TRUSTEE OF THE EVANSVILLE CONTRACT COMPANY, BANKRUPT; JACOB EICHEL, LAURA EICHEL, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED AUGUST 6, 1909.

(21,791.)

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a

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. BRAY, M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt; JACOB EICHEL, LAURA EICHEL, et al., Appellants.

versus

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, RITER-CONLEY COMPANY, and NICOLETTE LUMBER COMPANY, Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Record Filed April 6, 1908.

Clerk's office, U. S. Circuit Court of Appeals, Fourth Circuit, Henry T. Meloney, Clerk, Richmond.

b

TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, on the first Tuesday in May, being the fourth day of the same month, in the year of our Lord one thousand nine hundred and nine.

Present:

Hon. J. C. Pritchard, Circuit Judge; Hon. Edmund Waddill, Jr., District Judge; Hon. James E. Boyd, District Judge.

Among other were the following proceedings, to-wit:

No. 812.

M. J. BRAY, Trustee of Evansville Contract Co., Bankrupt; M. J. BRAY, LAURA EICHEL, JACOB EICHEL, et al., Appellants,

versus

UNITED STATES FIDELITY AND GUARANTY COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Be it remembered that heretofore, to-wit, on the 6th day of April, 1908, transcript of the record of the said Circuit Court in the said

entitled cause, was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows, to-wit:

1 *Transcript of Record.*

Be it remembered, That heretofore, to-wit: On the 21st day of September, 1907, came the United States Fidelity & Guaranty Company, by counsel, and filed in the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg, its bill of complaint, which said bill of complaint is in the words and figures following, to-wit:

Bill of Complaint.

In the Circuit Court of the United States for the Northern District of West Virginia.

To the Honorable Judges of the said Circuit Court:

The United States Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, having its office and principal place of business in the City of Baltimore, in the State of Maryland, and as such a citizen of and a resident in the said State of Maryland, brings this, its bill, against M. J. Bray, trustee of the Evansville Contract Company, bankrupt, and Jacob Eichel and Laura Eichel, each and all of whom are citizens of and residents in the State of Indiana, in the City of Evansville therein; the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana, and the First National Bank of Rockport, Indiana, each and all of said banks being corporations created and existing under the laws of the United States relating to Banking Associations, and each being engaged in business, and having their place of business located in the respective towns and cities in the State of Indiana mentioned in their respective titles, being citizens of and residents in the State of Indiana; the Second National Bank of Parkersburg, West Virginia, and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, the two defendants last named being corporations under the laws of the United States relating to Banking Associations, and located in the said City of Parkersburg, West Virginia, and in said District, and as such citizens of and residents in the State of West Virginia, in the Northern District of West Virginia, and the Farmers Bank of Rockport, Indiana, a corporation under the laws of Indiana and as such a citizen of and
2 resident in the State of Indiana, and the Riter-Conley Company, a corporation under the laws of the State of Pennsylvania, doing business in the City of Pittsburg, and as such a citizen of and resident in the State of Pennsylvania, and the Nicolette Lumber Company, a corporation under the laws of the State of West Virginia, located and doing business in the County of Wood, in the said state of West Virginia, in said District, and as such a citizen and resident of said State and District.

Your orator complains and says:

1st. Your orator is engaged in fidelity insurance and general surety business, and prior to the year 1904 had become surety on several bonds executed unto the United States by the Evansville Contract Company, hereinafter called "Contract Company," a corporation under the laws of the State of Indiana, for the performance of certain contracts covering improvements to be made in the Ohio, Big Sandy and Congaree Rivers, which bonds are as follows:

(*a*) Bond dated November 21, 1904, for the construction of Dam No. 18, Ohio River, in the penalty of ninety thousand dollars.

(*b*) Bond dated September 19, 1903, for the construction of Dam No. 3, Ohio River, in the penalty of fifty thousand dollars.

(*c*) Bond dated October 2, 1902, for the construction of Dam in Congaree River, South Carolina, in the penalty of thirty thousand dollars.

(*d*) Bond dated November 13, 1900, for the construction of Dam in the Big Sandy River, in the penalty of thirty thousand dollars.

Each of the said bonds was conditioned as required by the Act of Congress of the United States of August 13, 1894,—28 Statutes at Large, 278—providing that any person entering into a contract with the United States for the construction or prosecution and completion of any public work * * * shall be required to execute the usual penal bond * * * with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract; the exact condition being that the Evansville Contract Company should "in all respect perform all and singular the conditions and agreements in and
3 by the said contract agreed and covenanted by said Evansville Contract Company to be observed and performed * * * and shall promptly make full payment to all persons who supply it labor or materials in the prosecution of the work provided for in said contract." In order to procure your orator to become surety on said several bonds, the Contract Company made applications on the printed forms of your orator, in writing, and therein agreed, among other things, to indemnify and save harmless your orator from all loss and liability and "in the event of the Contract Company being unable to complete or to carry on the aforementioned contract to assign, and does hereby assign, such plant as it may have upon said work" unto your orator. And in the contract with the Government, made part of each bond, it was, among other things, provided: that a certain per cent. of the money earned should be retained by the Government until completion; that in case of default by the Contract Company the Government should have the right to take possession of the work and plant and prosecute the matter to completion; and the applications made by the Contract Company further provided that your orator should be subrogated to every right of the principal, and to take all the moneys to be paid by the Government, including the retained percentages

in the event of any breach or default on the part of the Contract Company.

A copy of said application is shown by Exhibit "A," herewith filed. A copy of the bond covering Dam No. 18 is herewith filed, marked Exhibit "B," and the other contracts and bonds relating to the works other than Dam No. 18 will be made part of the record as soon as the same can be obtained and produced. Your orator cannot produce the original application connected with any one of the said bonds, for the reason that the originals were destroyed in the fire in Baltimore in February, 1904; but the terms thereof are shown by Exhibit "A," which is the printed form in use when the several bonds were executed; and on each of the applications the said Contract Company signed its name and made its contract, filling up the blanks accordingly, and upon the faith and in consideration of the agreements and indemnity therein set forth, and of your orator's rights as surety under the said bonds and contracts aforesaid, your orator did become surety, and had no collateral or other security from said company.

2d. This cause presents a controversy arising under the laws of the United States, relating to Government contracts and sureties under the Act of Congress above mentioned. Your orator has a lien, hereinafter more fully set forth, upon a fund of over
4 $27,000.00 in the hands and possession of the said M. J. Bray trustee, and acquired by the said Bray as trustee, and this Honorable Court has jurisdiction of this cause under Section 23*a* of the Act of Congress relating to bankruptcy; and your orator charges that it has a claim against that fund, adverse to the pretentions and claims and possession of the said trustee.

Of the funds of the said trustee, a large sum of money, to wit, twenty-six thousand dollars, is deposited in equal amounts of thirteen thousand dollars each, or about that, in the said Farmers & Mechanics National Bank of Parkersburg and in the said Second National Bank of Parkersburg, in said Northern District of West Virginia, and within the jurisdiction of the court; and this Honorable Court has jurisdiction of this cause under Section 8 of the Act of March 3, 1875, relating to suits for the enforcement of liens and the assertion of claims and the removal of clouds upon real and personal property within any District.

Your orator further charges that M. J. Bray was on or about the 20th day of March, 1906, appointed trustee of the said Evansville Contract Company, at the said City of Parkersburg, in said District, by the District Court thereof in Bankruptcy; and that the said Contract Company was on the 27th day of February, 1904, adjudicated a bankrupt by the Honorable District Court of said Northern District of West Virginia, and this Honorable Court has jurisdiction because the matters herein set forth are within the judicial power of the United States, and within the equity jurisdiction of the Courts of the United States.

3d. Your orator shows that by virtue of the contracts of indemnity executed to it by the said Contract Company your orator acquired a lien, by the terms thereof, upon all of the plant and prop-

erty of the bankrupt at and about each of the several dams and constructions, respectively, or owned by the bankrupt as in said contract set forth. And your orator acquired a lien upon all funds and moneys earned by or received from said contracts in the hands of the Government of the United States, and due or owing under the said several contracts of construction, and each of these liens was in existence at the time that the said Contract Company was adjudged a bankrupt, and still continues, at least so far as may be necessary for the indemnity of your orator, for or on account of any and all liability whatever arising upon each and all of said bonds. And your orator, from the time of the execution of each of said bonds, had, and now has, every right and remedy of the Government, against the said Contract Company, and was, and is, entitled to every provision of each of those contracts, in favor of the Government, and for its protection; and, so likewise, your orator had and has every right and remedy of the Contract Company against the Government, and every right and remedy of persons who furnished material in the prosecution of the work, and all of such rights and remedies, whether arising by direct expression of the written instruments, or arising in equitable doctrines of subrogation, are appropriate to be administered by this Honorable Court.

4th. On the 27th day of February, 1904, the Evansville Contract Company was adjudicated a bankrupt, and since that time, as shown by the record, its plant and property has been sold and disposed of under the orders of the court, the amount arising from the sales of the plant in and about Dam No. 18 being about $61,000.00, and from sale of property at other places being about $3,000.00, making a total amount arising from such sales of plant about $64,000.00, more or less, as shown by a copy of a statement or report filed by the Trustees up to December 19, 1905, as marked Exhibit "C," and the funds then on hand would amount to about $36,000.00 subject to allowances undetermined and unadjusted.

5th. The net amount now in the hands of the said trustee, Bray, and held by him, after deducting from all moneys received from the Government and the proceeds of property, the allowances and charges of administration—is about $27,600.00, of which $26,000.00 is deposited in equal amounts in the said Second National Bank and Farmers & Mechanics National Bank of Parkersburg, W. Va., as above stated.

Your orator has a lien upon and a claim against that fund for whatever amounts may be recoverable by persons having right of recourse on your orator's bonds; and your orator is entitled to have that fund applied in payment of the claims of whatever persons have supplied labor and materials in the prosecution of the work covered by your orator's said bonds, subject to the payment of premiums due your orator and to some unpaid costs.

6th. The Evansville Contract Company became unable "to complete or to carry on" any of the construction contracts above mentioned; and your orator's lien had thereby fully attached to its prop-

erty and to its assets at the time of the adjudication in February, 1904.

7th. After the adjudication was made in bankruptcy the creditors of the bankrupt elected the said M. J. Bray, and also C. D. Dotson and Alfred Heine, trustees; and these trustees, in March,
6 1904, filed their petition before the Referee, George W. Johnson, a copy of which is herewith filed as part of this bill; and upon the hearing of the matters arising on that petition, and by authority of the creditors of the Contract Company, an order was entered on the 11th day of April, 1904, a copy of which is filed, marked "D," authorizing the trustees to conduct the business of the bankrupt, and to borrow money upon certificates to the amount of $75,000 issued by them and to pay the premiums accruing to sureties on bonds given to the Government, and to perform and to complete the contracts existing between the Bankrupt and the United States; "to collect the contract price, and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of the contract."

Your orator was the surety company referred to as the person to whom premiums should be paid, and who should be protected and saved harmless.

7th. In the petition filed by the trustees and referred to in the order of April 11, 1904, it was averred, and it had been stated and represented by Jacob Eichel, former president of the Contract Company, and by others connected with him, that large profits could be realized from the completion of the several contracts of the Government which were then in an unfinished state, and the main reliance was upon the contract regarding Dam No. 18, with a valuable plant and property owned by the Bankrupt, all situated in said District within the jurisdiction of this court, and about six miles from its Court House. The liabilities and indebtedness of the bankrupt exceeded $200,000.00, and among the creditors were banks that held no security. After learning of the collapse of the Contract Company your orator inquired prior to the making of the order of April 11th as to the probable amount owed to persons who furnished material or labor in the prosecution of the several contracts covered by said bonds, and was informed by Jacob Eichel, and by the trustees, that the amount of such indebtedness was about $40,000 and the names of some of the supposed holders of such claims were given. Up to that time your orator had no knowledge whatever of the quantity of materials purchased, or of any claim owed for material or labor, and to this day your orator does not know what claims are just or are properly recoverable on that account; but when your orator found that the Contract Company was bankrupt, and learned that creditors were desirous of having the contracts finished, in the belief that a large profit would be realized therefrom, your orator, through its Chief Engineer, Charles F. Wood,
7 expressed a willingness to allow the creditors to take charge of all the contracts and complete them and to reap the benefits to be derived therefrom, if, and only if, your orator should be fully indemnified and saved harmless against all liability what-

soever to the Government, and on any claims for material or labor or other claims upon its bonds.

Your orator then claimed and now charges that when the Bankruptcy occurred your orator had the right to take charge of that work, and to take hold of the plants of the Bankrupt, and to receive the retained percentages from the Government, and thus protect itself by completing each contract; and your orator charges that it could by efficient management have fully completed every contract without loss. After some negotiations it was agreed that indemnity should be furnished to your orator by a few of the responsible creditors and that several would execute an agreement of indemnity; and under date of the 11th day of April, 1904, an agreement was signed by your orator, expressing the understanding had—that upon the delivery by said banks to your orator of a bond in the sum of $75,000.00 to indemnify your orator from all liability heretofore accrued or hereafter accruing against it, by reason of its suretyship on said four several bonds, then (your orator agreed) as follows:

First. To consent that the trustees in bankruptcy of the Contract Company should perform the contracts with the Government; second, that the moneys in the hands of the Government accrued and accruing to be paid to the trustees; third, that the trustees may borrow money and issue trustees' certificates therefor, and that your orator would co-operate and execute all consents necessary to facilitate the performance of the contracts; and, fourth, that the premiums on the bonds given by your orator should be paid.

A copy of that agreement is herewith filed, marked "Exhibit E." It was made in view of the terms of the decree or order made by the Referee on that same 11th day of April, 1904. The trustees who were proposed to continue the business and to perform these contracts were strangers to your orator. They were the selected agents of the creditors, and your orator had no interest whatever to subserve, except to protect itself from loss, while willing that the creditors might derive the benefits of any profit that might arise.

Prior to the 11th day of April, 1904, all these matters had been discussed, and some of the several banks, defendants herein, had authorized the giving of the contemplated bond as early as the 2nd day of April, 1904, and, accordingly, after the 11th day of April, 1904, a bond was delivered unto your orator, executed by the National Banks and the Farmers Bank of Rockport, defendants herein, in the aggregate sum of seventy-five thousand dollars, "and each of the said obligors binds itself severally, and not for any other person, to pay such proportion of said sum of seventy-five thousand dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness, as shown below. Dated April 4, 1904."

That bond recites each one of the bonds given by your orator, and the bankruptcy of the Contract Company, the appointment of trustees, and an order passed at a meeting of creditors on the petition of trustees, authorizing the trustees to conduct the business of the Contract Company and to finish the contracts theretofore undertaken

by the bankrupt, and to borrow seventy-five thousand dollars on trustees' certificates, "and whereas the undersigned creditors of said bankrupt believe it to be the interest of the creditors that such contracts be finished by said trustees, and that moneys be borrowed by the trustees, according to the decree or order of the Bankrupt Court; and the United States Fidelity & Guaranty Co. is unwilling that that course should be taken, unless it may be indemnified against any liability that has accrued or may accrue to it by reason of its being surety on each of the bonds above mentioned.

"Now, therefore, if the bonded obligors shall and will in all respects indemnify and save harmless the said United States Fidelity & Guaranty Co. from all loss, cost, charge, damages and liability heretofore accrued or hereafter accruing against it by reason of its suretyship or liability on said bonds, and on each of them, then this obligation to be void; otherwise to remain in full force and virtue.

"The debts and liabilities referred to in this bond for the purpose of reckoning the proportions above mentioned are as follows:

"City National Bank of Evansville, Indiana	$5,000
"The First National Bank of Evansville, Indiana	24,000
"The Citizens National Bank of Evansville, Indiana	24,000
"The Farmers & Mechanics Nat'l Bank of Parkersburg, W. Va.	20,000
"The Second National Bank of Parkersburg, W. Va.	25,000
"The Farmers Bank of Rockport, Indiana	10,000
"The First National Bank of Rockport, Indiana	7,000
	$115,000"

That bond making each bank severally liable to your orator for such proportion of seventy-five thousand dollars (amount
9 of certificates) as the claim of each bank bore to the aggregate of their debts—was executed by each bank by the due and formal action of its Board of Directors for the purpose of protecting its own debt; and upon the faith thereof your orator allowed the trustees to take charge of all of the contracts and all of the plant and material and property of the bankrupt, and of all the funds in the hands of the Government; and your orator remained liable to the Government for the performance of the contracts and to all persons furnishing materials to the trustees.

Your orator files as part hereof copies of the order made in bankruptcy on the 11th day of April, 1904, as Exhibit "D;" the bond of said banks, dated April 4, 1904, as Exhibit "F;" the agreement of your orator, dated April 11, 1904, agreeing to allow trustees to take charge and to finish the contracts and to issue certificates, etc., upon delivery to your orator of the agreement of indemnity from the banks—Exhibit "E." And your orator charges that it accepted in good faith the said bond or indemnity agreement of the said banks, and that the same still stand in full force and virtue, and that your orator has complied with everything on its part agreed to be done and performed with regard thereto; and these several agreements

were made and delivered at the said City of Parkersburg, W. Va., in said District.

8th. After the order of April, 1904, and your orator's agreement of that date, and after the delivery of the said indemnity agreement dated April 4, 1904, became effective, the said trustees did issue certificates for a large amount, and in the course of time they performed and completed the several contracts with the Government of the United States. Many thousands of dollars were realized and received by the trustees under the contracts had with the Government. Your orator did not then know and cannot now state what are the names of the persons, nor the amounts of the claims which have right of action against the bonds given by your orator unto the Government and above specified. Your orator felt entirely secure and relied absolutely upon the indemnity furnished by the said banks—each of which proved its claim as a creditor before the Referee in bankruptcy, and upon the honesty and integrity of the trustees to protect the interests of all concerned, and especially upon said Bray, who was represented to be of highest probity and character. Your orator had no knowledge or notice of any fraud or bad faith on the part of any of the defendants herein named until long after the giving of the bonds and the making of arrangements for your orator's indemnity and after the work on the Government contracts was completed.

10 9th. By the order of April 11, 1904, the trustees were, among other matters, authorized to and did employ Jacob Eichel, president and general manager of the bankrupt, at five hundred dollars per month and expenses, to assist the trustees in looking after the interests of creditors; and before your orator agreed to consent that the trustees should complete said contracts, and prior to making any agreement whatsoever with the banks or others on that subject, the said Jacob Eichel assured your orator, through its representative, Mr. Wood, that the completion of the Government contracts would realize far more than sufficient to pay off all of what were termed preferred debts, and also realize a large sum to be distributed to general creditors; that Eichel himself was very largely interested in completing the works and paying off the creditors; and that if your orator would consent to any arrangement by which the trustees could proceed with the performance of the contracts and give a first lien on the property for receiver's certificates, then he, Eichel, would proceed at once to get control of all claims of the class or character having recourse on your orator's bonds; and that he would guarantee that your orator would have no trouble or question with regard to any such claims; and that no demand should be made against your orator on that account. By preferred claims, Eichel meant all of those claims which were entitled to be paid in preference to any other claims, and were just such as would have a right of recourse on your orator's several bonds for material and labor furnished.

Your orator trusted to these reliances and assurances of the said Eichel as one consideration in agreeing to accept the indemnity from the banks and the making of the arrangements hereinabove shown.

10th. The books and papers of the bankrupt were in the charge and possession of the trustees. Your orators believed that they were honest and advised by competent and honorable counsel; that they would not knowingly permit the allowance of a claim that was unjust, especially as the assertion of an unjust claim is made criminal by section — of the Bankrupt Law; and your orator had no suspicion that the trustees or their counsel or their salaried assistant, Eichel, would seek to defraud the creditors or your orator in any particular.

But some time about the 19th day of November, 1904, the trustees, upon a suggestion that it was desirable to ascertain what were the preferred debts having right to first payment out of the funds of the bankrupt estate—procured a showing before the Ref-
11 eree and an adjudication under the date of November 19, 1904, adjudicating, among other things, upon the testimony of Jacob Eichel and Alfred Heine, "that the following claims are preferred claims in this bankruptcy, and are so established in this decree as claims of that character," as shown by the last clause of said decree, herewith filed as Exhibit "G." Those claims, amounting to about $40,000, correspond in a general way with what your orator had been told was due to material and labor claims; but your orator did not discover until the 5th day of September, 1907, that substantially all of those claims, with the exception of those held by the Riter-Conley Company and the Nicollette Lumber Company, had been bought up at a discount—some of them as low as fifty per cent—and the aggregate averaging a cost of less than eighty per cent—by Philip W. Frey, the general counsel of the trustees in bankruptcy, in conjunction with M. J. Bray, trustee, and Jacob Eichel; and that the said counsel and the said trustee, in further collusion and conspiracy and in violation of their fiduciary and trust relations, had acquired these claims, and had been instrumental in fixing the same as entitled to first payment out of the assets of the bankrupt, and as belonging to the class having right of action on your orator's bonds, against which the said banks had guaranteed your orator against loss; and your orator then also for the first time discovered that under date of December 12, 1904, the said P. W. Frey, in writing addressed to the said M. J. Bray, trustee, recited that the said Frey was the owner of all those claims; that Bray was interested therein; that one-half of the profit thereon was $4,500.00, and directing Bray to pay one-half of said profit to the said City National Bank of Evansville, as shown by a copy of said paper herewith filed, marked Exhibit "H;" that said paper refers to this adjudication made by the Referee on the 19th day of November, 1904, and recites, as the truth is, that whatever claims have right of recourse on your orator's bonds are entitled to first payment out of the funds in the hands of the trustees. Your orator also learned in September, 1907, from the statements of Bray and others, and from documents of which copies are herewith filed as exhibits, that shortly after the bankruptcy of the Contract Company the claims listed in the said paper of December 12, 1904, were acquired by the said Frey in the manner following: Drafts were made on the said P. W. Frey for

the amount agreed to be paid for these several claims; said drafts were generally made by the said Jacob Eichel with the claim attached. The amount of the draft was paid by the said City National Bank, and then the amounts so advanced by the bank were covered by the notes executed jointly by the said Frey and M. J. Bray.

trustee of the bankrupt, and said Bray kept an account thereof
12 on his books under title of "Frey Accounts." These notes were finally taken up by the said M. J. Bray; and afterwards, under the false and fraudulent pretense that Laura Eichel was the owner of such claims, the said Frey assigned the same unto the said Laura Eichel under date of November 30, 1906, and said assignments were thereafter filed before the Referee, but the date of such filing does not appear. After that, and about the 1st and 2d days of March, 1907, suits were brought on these several claims in the Court of Common Pleas of Allegheny County, Pennsylvania, at Pittsburg, for the use of the said Laura Eichel, as shown by a list of said suits herewith filed, marked Exhibit "I." Your orator did not know, even at the time of bringing such suits, that any such claims were in themselves fraudulent and unjust, or that the said M. J. Bray or the said Philip W. Frey had any interest therein.

Your orator then supposed that Jacob Eichel alone was so interested, and was using his wife's name as a mask for his own interest.

Your orator did not discover until September 5, 1907, that under date of December 31, 1906, papers had been executed between the said Laura Eichel and the said M. J. Bray, as follows:

First. A note for $27,037.39, at three per cent interest, was executed by Laura Eichel and her husband to said Bray, marked "K." No part of that note has been paid, and no one except Bray paid for the claims.

Second. A contract between Laura Eichel and M. J. Bray of that same date recited that Laura Eichel had bought "the following claims for material against the Evansville Contract Co." (listing the names of the claimants, the *fact* of the claims and the amounts paid therefor), showing the par value of $35,663.82, for which was paid $27,037.39. That paper agrees that Bray, having furnished the money to buy these claims, and he holding Laura's note for $27,037.39—therefore all of the said claims which were then in the hands of Messrs. Hall & Metcalf, the attorneys in Pittsburg, with whom said claims had been entrusted for collection, shall be held by the said Bray, who was to receive all the money collected from said claims, and after the note is fully paid he is to retain as his share of the interest and profits of this transaction one-half of all the money received by him over and above the note, marked "L."

Third. An order in writing, signed by Laura Eichel, directing Messrs. Hall & Metcalf to pay to M. J. Bray the proceeds of all claims aforesaid, marked "M."

13 Your orator charges that the buying of said claims was a violation of the trusts and duties of the said Eichel and of the said P. W. Frey and of the said M. J. Bray, trustee; that the name of Laura Eichel was used as a mere mask and cover for the real parties to the fraud on the bankrupt's estate, and upon your

orator; that M. J. Bray is the real owner of said claims; that he has caused the same to be prosecuted in the City of Pittsburg against your orator, and in fraud of your orator's rights and in violation of equity, conscience and good faith; that some of said claims are unjust as labor or material claims; that your orator has not been able so far to ascertain the facts as to many of them; that the claim in the name of the Clydesdale Stone Co. for $6,185.33 appears to have been purchased for the amount of $3,606.30 by a draft drawn by Jacob Eichel on the said P. W. Frey, and your orator charges that a large part of the said claims covers material that was not furnished in the prosecution of any Government contract on which your orator was at any time liable, and the claim of the Monongahela River Coal & Coke Co. for $4,592.98, purchased at fifty per cent discount, is not for material or labor furnished in the prosecution of any contract in regard to which your orator was surety, being in large part at least only for coal alleged to have been purchased by the bankrupt.

After these suits against your orator were brought in Pittsburg in the Court of Common Pleas, in March, 1907, your orator interposed defenses, and in an effort to ascertain at Evansville whether the indemnifying banks of that city could effect an adjustment of all matters in controversy, your orator, on April 13, 1907, learned that M. J. Bray had some interest in the claims, and the documents and the proofs with regard thereto were obtained in the course of depositions given by Brady and others on September 5, 1907, at Evansville, Indiana.

11th. By the 19th day of December, 1905, the trustees in bankruptcy had completed all of the contracts and filed a report before the Referee, showing that before that time the amounts received from the Government and from the sale of plant and property, after deducting disbursements, left the sum of $36,602.96, subject to allowances and costs of administration yet undetermined; and that the operations of the trustees had not resulted in a profit, and that the funds in the hands of the estate would not pay the claims that had been decreed entitled to first satisfaction; and up to about that time your orator had been constantly assured by the trustees, and especially by the said trustee Bray, that all of the claims of persons for material or labor having recourse on your orator's
14 bonds would be paid; and that the money in the hands of the trustees after paying allowances and operating expenses would at once be applied for that purpose; but your orator found that no such appropriation was being made; and about that time the attitude of the trustees changed, and it became apparent that there was a purpose to deprive your orator of the right to apply that fund for its relief, or to pay such material claims; and on or about the 12th day of February, 1905, your orator filed a petition before the said Referee in Bankruptcy, setting up the several proceedings and asserting its right to have the funds in the hands of the trustees applied to the payment of such claims as had recourse against your orator, under the said Acts of Congress, and the bonds given pursuant thereto. Your orator in said petition charged its liens upon

the funds and its rights to be exonerated, and that the several indemnitor banks are interested, and prayed that the rights and liens of your orator should be enforced upon the funds in the hands of the trustees; that the court would ascertain what persons are entitled to enforce any liability upon any of your orator's bonds; and that the funds in the hands of the court be applied to the satisfaction of such claims when ascertained, and making the trustees and indemnitor banks parties; all of which appears by a copy of said petition herewith filed, as Exhibit "N."

12th. Notice was given to the trustees and to each of said banks upon that petition, but no one of said banks has at any time appeared thereto, or in any manner assisted your orator in seeking to protect themselves against the liability.

A demurrer on the part of the trustees to that petition was overruled. About March 1, 1906, Alfred Heine died, and the surviving trustees resigned. On March 20, 1906, the said Bray was appointed sole trustee, and still remains such, and now holds the present fund of the said bankrupt estate.

An answer was filed by Bray to your orator's petition, on which issue was joined and deposition were taken, and the questions arising thereon are still pending and undecided before the Referee.

On the 12th day of February, 1906, upon the petition of one J. G. Eigenman, the Referee passed an order instructing the trustees to file the necessary pleadings "to raise the question as to whether or not the claims heretofore allowed as preferred are properly preferred claims, and for the re-examination and consideration thereof," and that the trustees file such pleadings by February 19, 1906.

On March 1, 1906, the trustees filed a petition setting out the creditors whose claims had been preferred, reciting that Eigenman had asked for a rehearing, and stating that they had called on Eigenman's attorney to state grounds for rehearing and reported that the grounds were:

1st. That the claims were not properly proved.

2d. They should not be allowed until proved.

3d. That the claims are not preferred and are not liens upon any property or proceeds.

4th. That the preference was not based on proper evidence.

Wherefore they prayed that the matter might be reheard.

A copy of that petition is herewith filed, marked "O." Nothing was ever done under it.

On September 11, 1906, J. G. Eigenman withdrew all appearance in the case, and asked to be excused from further proceeding, as shown by Exhibit "P."

Up to this present date there is not anywhere a suggestion on the part of any one of said trustees that the claims ought not to be allowed on the ground that the same are unjust, or on the ground that the same do not represent material or labor furnished in the prosecution of one of the contracts, or that the same cannot be allowed, for the reason that the parties holding the same perpetrated a fraud on the creditors and were guilty of breaches of trust in buying the same, nor do they allege or show that any part of such claims

were purchased at fifty cents on the dolllar, or that M. J. Bray, one of the trustees, together with Jacob Eichel, a high-salaried fiduciary, and P. W. Frey, the counsel for the trustees, participated in any frauds upon the court and used their position to establish such claims ag-inst the bankrupt's estate and against your orator's liability, in fraud of their duty and against conscience. No evidence was ever taken on the subject, and the said Bray and Eichel and Frey fraudulently concealed the facts known to them, and especially concealed the breaches of trust and the fact that they had been speculating and buying up such claims at a discount, and they had been using their positions in fraud of the fiduciary relations in which they stood. Your orator charges that no effort has ever been made in good faith by the trustees to go into the facts regarding such claims; to disprove them or any one of them; to challenge the fairness thereof, or to relieve the estate threfrom, except that when they found it was to their pecuniary interest to appropriate on the claims of general creditors, held by them, the funds in the hands of the court, they have sought to maintain the amount of the claims at their full face value, and to enforce them against your
16 orator, who, until very recently, had no intimation that the same were unjust charges against your orator.

13th. In August, 1907, the suits that had been instituted in the Court of Common Pleas remained pending and new actions were brought on these identical claims under the respective styles as follows:

UNITED STATES OF AMERICA for Use of (Here Giving the Name of the Original Plaintiff or Holder of Claim) Philip W. Frey, and Now for Use of Laura Eichel,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation.

Nos. 24 and 25, upon the claim of the Clydesdale Stone Company for material furnished and work done on Dams Nos. 3 and 5. (These cases were first brought in the Federal Court.)

The following claims were sued upon under the title above mentioned in the Circuit Court of the United States for the Western District of Pennsylvania, at Pittsburg, after having been first sued in the Common Pleas Court:

No. 42, Southaestern Lime and Cement Co., Dam in Congaree River.

No. 44, Lombard Iron Works, Congaree River.

No. 45, Pittsburg Trolley Pole Co., same dam.

No. 43, E. L. Neal, Dam No. 18, Ohio River.

No. 46, C. D. Dotson, Dam No. 18.

No. 48, C. C. Martin & Co., Dam No. 18.

No. 49, Nicola Bros. Co., Dam No. 18.

No. 51, L. Kramer & Son, Dam No. 18.

No. 53, Parkersburg Mill Company, Dam No. 18.

No. 55, Monongahela River Consol. Co., Dam No. 18.

No. 57, Withers & Vandevander, Dam No. 18.

No. 47, Clydesdale Stone Co., Dam No. 3, Ohio River.
No. 50, Duncan & Porter Co., Dam No. 3.
No. 52, Monongahela River Consol. Co., Dam No. 3.
No. 54, E. L. Olens, Dam No. 3.
No. 56, J. H. Webster Variety Iron Works, Dam No. 3.

And the same are now there pending as shown by Exhibit "Q," which will be supplemented by judicial record, if required by the court.

Laura Eichel, for whose said pretended use said suits are being prosecuted, is the wife of the said Jacob Eichel, and your
17 orator charges that all of said suits have been brought, not for the use and benefit of the said Laura, but for the use and benefit and by the instigation of the said Bray, in fraud of your orator's rights, and for the purpose of harassing and oppressing your orator, of multiplying suits and proceedings, and to avoid the application of the primary fund, which is in the hands of the said Bray in the jurisdiction of this Honorable Court, where all of the transactions occurred, where Dam No. 18 is located, and over sixty thousand dollars was realized from plant there situated, and the claims aforesaid are most largely for materials furnished for said dam.

The said Bray and the said Eichel have gathered unto themselves control of most all of the claims against the bankrupt's estate—they control the trusteeship and the right and the authority to take proceedings in bankruptcy, to expose and to redress frauds on the funds; they have corrupt interests to subserve in fraud of your orator and other creditors; they have interfered with your orator's indemnitors, stirring trouble and creating embarrassments for your orator; and your orator charges that this Honorable Court should enjoin all of the above mentioned actions, and all proceedings against your orator for the collection of any of the claims held by the said Bray or Eichel or any of the defendants, and should adjust all the claims and equities of all parties concerned, and this is the only court that can afford full, adequate and complete relief in the premises, ascertaining what amount should be paid to each, and by whom, and enabling your orator to ascertain its liability, and to have the same satisfied out of the funds properly applicable, and by the indemnitors under their contract.

14th. The said Bray and Eichel have entered into a scheme and conspiracy to not only deprive your orator of its right to apply the funds in the trustee's hands to the payment of just claims for material, but it is a part of their scheme to compel your orator to pay claims that are unjust, and to divert the fund to the payment of the many unsecured claims in which the said Bray and the said Eichel are interested.

15th. After your orator had accepted the indemnity bond of the defendant banks, the said Farmers & Mechanics National Bank and the Second National Bank of Parkersburg sold their respective claims of $20,000.00 and $25,000.00 to the said Jacob Eichel at a large percentage of their face, and made assignments thereof, at a time when such sales were made possible by reason of the profits

expected to accrue from your orator's permitting the per-
18 formance of the Government contracts. The said Eichel likewise acquired in his own name, or in that of his wife, the claims of all the other indemnitor banks who executed the bond of April 4, 1904; that is to say, the said Jacob Eichel was assignee in 1906 of the claims of the Citizens National Bank, of the First National Bank, and of the City National Bank, of Evansville, and his wife, Laura, was the pretended owner of claims of the Farmers Bank of Rockport and the First National Bank of Rockport, the claims of the two banks last named having been prior to January 31, 1905, assigned to the said Philip W. Frey, counsel for the trustees, as shown by his statements herewith exhibited, marked "R" and "S."

The said Laura and Jacob Eichel appeared, by power of attorney filed with the Referee and dated December 1, 1906, to claim substantially all of the indebtedness of the bankrupt, excepting that of the Riter-Conley Company and of the Nicolette Lumber Co., as shown by Exhibit "T."

16th. The said Jacob Eichel was adjudged bankrupt on the — day of September, 1904, and was discharged on the — day of February, 1905, in the District Court of the United States for the — District of Indiana, as shown by Exhibit "U."

17th. Of the obligor banks, the First National Bank of Evansville is in liquidation, and its remaining assets are being distributed as fast as five per cent is realized, so that the security of your orator is thereby endangered, and the said Jacob Eichel, bankrupt, has agreed to indemnify the said First National Bank and the said Citizens National Bank, representing $48,000.00 of the $115,000.00, as shown by Exhibit dated November 3, 1906, herewith filed, marked "V." The said M. J. Bray has contracted to indemnify the First National Bank of Evansville against all liability on said bond, as shown by a copy of said contract herewith filed, marked "W," and your orator is informed, believes and charges that all of the other obligor banks, except the Second National Bank and the Farmers & Mechanics National Bank of Parkersburg, have also been in some way indemnified against such liability by the said Jacob Eichel, or by the said M. J. Bray, or by the said Laura Eichel, or by some one or more on their behalf; and your orator is informed, believes and charges that the said Parkersburg banks pretend that they propose to escape such liability on the ground that they had no power to make this contract for their benefit, on the strength of which they realized largely on their respective claims.

19 18th. Each of the said defendant banks is bound by the contract of April 4, 1904. Your orator accepted the same in good faith, relied thereon in making the agreements shown; no bank became bound in excess of the amount of its own direct debt; each bank had the full benefit of the contract. Your orator could fully have saved itself from all loss or liability if it had not yielded to importunities that the trustees be permitted to fulfill the contracts. Each of the said banks had the benefit of their contract, and each of

them is bound and estopped to deny *his* proportionate liabillity according to the terms thereof. All of the certificates issued by the trustees have been paid in full. The net funds now in the hands of the trustees, after payment of premimus due your orator and some unadjusted costs, should be first applied to the satisfaction of whatever are just claims having right to recourse against your orator as surety on said bonds; such was the understanding of the creditors and of the trustee, and of all parties concerned when said decree of April 11, 1904, was entered; that such has always been, and still is, known to be the understanding, and according to the true purpose and intent of the parties and the contracts executed by them. Bray and Frey and Eichel actually purchased material claims because of that understanding, and at a time when they intended that the same would be paid first and in preference to all others. There is no other claim or lien against said fund, except for the payment of premiums owed to your orator for the liability on those bonds, which has continued to this date.

19th. Your orator charges that an accounting should be had, and the court should ascertain what claims are proper charges for material furnished under said contracts, according to the Act of Congress and the laws of the United States in such cases made and provided; that of the claims mentioned in the assignments and contract between said Bray and Laura Eichel, none should be allowed in excess of the amount actually due thereon, and actually paid therefor in either case; that a discount made on any claims shall be eliminated in its allowance; that each one of the said defendant banks is interested in the application of the funds in the hands of the trustee to the satisfaction of said claims; that without the interference of this Honorable Court litigation and controversy with regard to the subject matter of this bill would result in a multiplicity of suits and in a grievous wrong and hardship to your orator; that the Honorable District Court in Bankruptcy has not settled and adjusted any such matter and has no jurisdiction or means to apply the requisite remedies by administering complete justice in one comprehensive suit; and your orator is remediless without intervention of this court.

Your orator has applied to the said District Court for permission to file this bill, and such permission and leave has been given, as shown by its order in that behalf.

Wherefore, your orator prays that the persons named in the caption of this bill may be made parties thereto, and be made to answer the same; but oath is hereby waived to any answer that may be filed by any such defendant; that Your Honors will decree that the fund in the hands of the said trustee, and now deposited in the Second National Bank of Parkersburg, and in the Farmers & Mechanics National Bank of Parkersburg, is subject to a lien for the payment of all claims and debts for material, and that the net amount thereof, after paying premiums due your orator, and costs of administration, shall be applied to whatever are just and proper debts owed by the bankrupt for materials and labor supplied within the meaning

of the said Act of Congress, and within the terms of your orator's bond.

That the court will decree:

That no claim held by the said M. J. Bray or by the said Jacob Eichel or by the said Laura Eichel, or by any agent or servant or attorney of them, shall be paid in an amount in excess of the sum actually expended therefor.

That due and proper proceedings may be had upon such notice or process as the court may prescribe for ascertaining the several amounts due for material and labor furnished under each and every one of the bonds aforesaid given by your orator; and that the liability of your orator on each bond be fixed; that the court will apportion said liability as to each party in interest; that the court will decree that each one of the defendants banks herein is bound and liable according to the terms of the said agreement of April 4, 1904; and that your orator is entitled to have the same enforced; that the court will apportion and fix against the Second National Bank of Parkersburg, and the Farmers & Mechanics National Bank of Parkersburg, now within the District of this court, and against each of the other banks, parties to said agreement, the amount for which each is severally liable, and decree the payment of the same.

And the further prayer of your orator is that the court will take full jurisdiction of all of the persons and of the parties hereto and administer complete justice between them; and that Your Honor will graciously grant your writ of injunction in due and orderly form, directed against the said Jacob Eichel and M. J. Bray and Laura Eichel, and enjoin and inhibit and restrain them and each of
21 them from instituting, prosecuting or maintaining any action or suits hereinabove mentioned pending in the said State or District of Pennsylvania, and from instituting any other action or actions against your orator on account of any claim or claims arising out of its suretyship on any bond or bonds given by your orator as aforesaid as surety for the Evansville Contract Company; and that it be adjudged and decreed that your orator is entitled to be relieved from all liability on its said bonds by the application of the funds in the hands of the trustee, and by the parties to the said contract of indemnity of April 4, 1904; and that your orator is entitled to all the rights and remedies that the parties hereto, or any of them, have against each other for indemnity or contribution.

And the further prayer of your orator is that the court may grant such other and general relief in the premises as in equity may be deemed just, and as the nature of the case may require.

UNITED STATES FIDELITY & GUARANTY CO.,
By B. M. AMBLER, *Counsel.*
B. M. AMBLER, *Attorney.*

UNITED STATES OF AMERICA,
Northern District of W. Va., State of W. Va., ss:

This day personally appeared before me, the undersigned authority of said county, Charles F. Wood, who, being by me first duly sworn,

upon his oath says that he is Chief Engineer of the United States Fidelity & Guaranty Company, whose name is signed as plaintiff to the foreging bill; that he is authorized to make this affidavit; that he has read the said bill, and that the facts and allegations therein contained, so far as stated upon his knowledge, are true, and so far as stated upon information, he believes the same to be true.

CHARLES F. WOOD.

Sworn to and subscribed before me this 21st day of September, 1907.

Given under my hand and official seal.

[SEAL.] S. R. HARRISON,
Clerk Ct. Ct. U. S. N. D. W. Va.

22 EXHIBIT A.

(Filed September 21, 1907.)

Agreement of Indemnity.

In consideration of The United States Fidelity and Guaranty Company becoming surety on the bond of the — herein applied for, it hereby covenants and agrees to pay in advance the premium or fees hereafter agreed upon, namely, $— for bid bond (the same to be credited on the premium for the contract bond), $— on the amount of the contract bond for the first year thereof, and $— annually thereafter until it shall serve upon said Company at its Home Office, in the City of Baltimore, competent written evidence of its discharge from such suretyship and all liability by reason thereof, and it does hereby bind itself, its successors and assigns, to indemnify the said The United States Fidelity and Guaranty Company against all loss, costs, damages, charges and expenses whatever, resulting from any of its acts, default or neglect that said The United States Fidelity and Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof. And it does further agree, in the event of its being unable to complete or carry on the aforementioned contract, to assign, and does hereby assign, such plant as it may own, or have upon said work to the said The United States Fidelity and Guaranty Company, under the aforesaid obligation, together with vouchers or other evidence of payment, of all costs and expenses whatever incurred by said The United States Fidelity and Guaranty Company in adjusting such loss or in completing said contract, as conclusive evidence against it, its successors and assigns, of the fact and extent of its liability under said obligation to the said The United States Fidelity and Guaranty Company.

And it does further agree in the event of any breach or default on its part in any of the provisions of the contract hereinbefore mentioned, that The United States Fidelity and Guaranty Company as surety upon the aforesaid bond shall be subrogated to all its rights and properties as principal in said contract, and that deferred pay-

ments and any and all moneys and properties that may be due and payable to it, at the time of such breach or default or that may thereafter become due and payable to it on account of said contract, shall be credited upon any claim that may be made upon The
23 United States Fidelity and Guaranty Company under the bond above mentioned.

In testimony whereof, the said — has to these presents affixed its corporate seal and caused the same to be attested by its — and its — this — day of —— 190–.

——— ———.
——— ———.

Witness:
——— ———.

EXHIBIT B WITH BILL.

(Filed September 21, 1907.)

Contractor's Bond (Public Works).

(When both principal and surety are corporations.)

Know all men by these presents, That we, The Evansville Contract Co., a corporation, existing under the laws of the State of Indiana, as principal, and the United States Fidelity & Guaranty Company, a corporation, existing under the laws of the State of Maryland, as surety, are held and bound unto the United States of America in the penal sum of ninety thousand ($90,000) dollars, to the payment of which sum well and truly to be made, we bind ourselves, and our successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, That whereas the above bounden The Evansville Contract Co., has, on the twenty-first day of November, 1902, entered into contract with the United States, represented by Captain W. E. Craighill, Corps of Engineers, U. S. Army, for building lock and guide walls for Dam No. 18, Ohio River.

Now, therefore, if the above bounden The Evansville Contract Co., shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said The Evansville Contract Co., to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of
24 the same, and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

In witness whereof, The parties hereto have executed this instrument this 21st day of November, 1902, the name and corporate seal of said principal being hereto affixed and these presents duly signed by its President, pursuant to a resolution of its Board of Directors, passed on the 21st day of November, 1902, a copy of the record of

which is hereto attached; and the name and corporate seal of said surety being hereto affixed and these presents duly signed by its President pursuant to resolution of its Board of Directors passed on the 31st day of July, 1896, a copy of the record of which is on file in the War Department.

THE EVANSVILLE CONTRACT CO., [SEAL.]
By JACOB EICHEL, *Pres.*

Attest:
ALFRED HEINE.

THE UNITED STATES FIDELITY & GUARANTY COMPANY. [SEAL.]
By JOHN R. BLAND, *President.*

Attest:
H. D. V. JOHNS,
2nd Ass't Secretary.

25

EXHIBIT C WITH BILL.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

To the Honorable George W. Johnson, Referee:

The undersigned trustees of the estate of said bankrupt hereby submit to you the following statement of total receipts and disbursements to December 19, 1905.

Assets.

Total Receipts per Monthly Reports of Trustees	$476,308.60	
Total Expenditures Monthly Reports of Trustees	413,726.30	
Balance on Hand		$62,582.30
Due us from the U. S. Government:		
Lock No. 18, Nov. Sand & Gravel bill	30.40	
Lock No. 18, Percentage Retained	20,408.36	
Dam No. 3, Percentage Retained	15,420.99	
		35,859.75
		$98,442.05
To this must be added final estimate for Lock No. 18		1,263.42
Total		$99,705.47

Liabilities of Trustees.

Outstanding Trustees' Certificates	$60,000.00	
Interest due on money borrowed	3,102.51	
		$63,102.51
Balance		$36,602.96

From this must be deducted the Court Costs, including allowances, not yet determined.

26 *List of Claims.*

Below we give a list of uncollected claims due the estate, all of which are in suit and being prosecuted.

Claim No. 22,954, Dam No. 6		$59,731.12
" No. 22,955, Cofferdam, Dam No. 3		2,358.00
Subject to 25% of Attorney fees of amount collected.		
Claim No. 24,887, Big Sandy River	66,177.70	
Subject to 25% to J. C. Thomas, and	16,544.42	
		49,633.28
" " 20% Attorney Fees.		
Claim No. 24,886:		
Lock No. 2	1,055.15	
" No. 3	1,060.00	
" No. 4	2,500.00	
Valve Stems, at No. 3	335.60	
Testing Iron	505.73	
		5,456.48
Claim No. 24,884, Penalty at Dam No. 2		5,137.50
" No. 24,885, Stone at Dam No. 6		1,253.23
" No. 28,729, Dam on Congaree River		1,639.57
Subject to 20% Attorney Fees of Amount Collected.		
Claim against John G. Eigenmann and Louis P. Eigenmann		10,014.10
Total of Uncollected Claims		$135,223.28

The attorneys' fees referred to above are contingent fees to Dudley and Michiner, of Washington, D. C.

M. J. BRAY,
C. D. DOTSON,
ALFRED HEINE.
Trustees, The Evansville Contract Co.

27 EXHIBIT D WITH BILL.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

At Parkersburg, in said District, this 11th Day of April, 1904.

This cause having been heard, considered and submitted to me for a decision and decree thereon, mentioned in the petition filed by the trustees herein, on the 17th day of March, 1904, at a meeting of the creditors, called for the purpose of passing upon the said petition, of which meeting ten days' notice was given to all of the creditors of the said bankrupt, informing them that said petition would be heard and considered at the law offices of George W. Johnson, in the City of Parkersburg, West Virginia, on the 29th day of March, 1904.

And it now appearing to the court that the said petition and pleadings herein, were submitted to the court, along with the depositions of Jacob Eichel and M. J. Bray, taken and had herein, on the 29th day of March, 1904, and filed herein on the said date in support of the allegations of said petition.

And it appearing to the court, from said pleadings and depositions filed herein, that it would be to the best interests of the creditors of the said bankrupt, that said business of said bankrupt be conducted for a limited period by the said trustees, M. J. Bray, C. D. Dotson and Alfred Heine; and it being made to appear likewise that it is absolutely impossible to conduct the said business as aforesaid, and to complete the contracts mentioned in said petition, and to release the said contracts, without borrowing money by the said trustees, from parties who are willing to loan the same, to conduct and complete said business and contracts, and to realize thereon.

And it further appearing to the court that it will be necessary to raise a sum of money for the purpose aforesaid, not to exceed the sum of seventy-five thousand ($75,000.00) dollars.

And it appearing to the court that no adverse interest appearing at said meeting, in opposition to the prayers of the petition, and especially to that prayer of the petition which prays that
28 the said trustees be permitted to conduct the business, as aforesaid, for a limited period, by borrowing sufficient money to run the said business and complete the said contract, as aforesaid.

On consideration whereof, it is adjudged, ordered and decreed by the court, that the said business of the said bankrupt be conducted for a limited period, to-wit, eighteen months from the date of this decree, reserving the right to extend this time, if, in the opinion of the court, it should be necessary.

And it is further adjudged, ordered and decreed, that the trustees herein, M. J. Bray, C. D. Dotson and Alfred Heine, be and they are hereby authorized to issue and deliver fifteen (15) certificates for the sum of five thousand dollars ($5,000.00) each, to the City National Bank of Evansville, Indiana, bearing interest at the rate of six per cent. per annum, from the day of the execution of the same, and maturing on or before six months from the execution of the same, to be received and accepted by the said The City National Bank of Evansville, Indiana, as evidencing the money so borrowed, as aforesaid, and the said certificates shall be a first lien on all and singular, the property of the bankrupt, provided that nothing in this order shall in any wise prejudice or affect liens that exist, and the pleadings under the bankruptcy court, and provided further that none of the certificates issued under this order shall have any priority, the one above the other.

The certificates under this order, shall be countersigned by the referee of this court and shall be in the following form:

This is to certify that M. J. Bray, C. D. Dotson and Alfred Heine, Trustees of the said The Evansville Contract Co., as such trustees, and not individually, are indebted unto The City National Bank of Evansville, Indiana, in the sum of five thousand dollars, payable on or before six months from the day of execution of the same, with interest from the day of execution at the rate of six per cent. per annum, out of the earnings of the said company, first, after such payments as may be necessary for the operations of said company's business, or out of the proceeds of the sale of the bankrupt's property, in the event the same is sold.

These certificates are each issued under the authority of and order of the bankrupt court, for the Northern District of West Virginia, at Parkersburg, in said District, made on the 11th day of April, 1904, in a case pending in said bankruptcy court, wherein the said The Evansville Contract Company, is bankrupt.

The said certificates are, by the terms of said order, a first lien on all and singular, the property of the said The Evansville Contract Company, hereinbefore provided and mentioned, owned
29 by it at the date of this order, or thereafter acquired by it, and upon the income thereof, provided, however, that no certificate issued under this order shall have any priority, the one over the other.

These certificates shall not become obligatory until countersigned by the referee of said Court, George W. Johnson, for the Northern District of West Virginia, at Parkersburg, and certified by him that the same has been issued under the order of the court.

And it is further adjudged, ordered and decreed that the said trustees may employ Jacob Eichel, Esq., the President of the said The Evansville Contract Company, bankrupt, and heretofore the General Manager thereof, at a sum not to exceed five hundred ($500.00) dollars per month, and in addition thereto, the necessary expenses of the said Jacob Eichel, in the discharge of his duties, under such employment, to assist said trustees in the completion of

the contracts mentioned in their said petition; and to prepare, present and try, for, to and in the Court of Claims of the United States, the several claims of the said The Evansville Contract Company, bankrupt, against the United States.

And the said trustees are hereby directed, empowered and authorized to hire and rent, at such reasonable prices, whenever necessary, boats, machinery and appliances, as may be needed, from time to time, in the completion of said contracts, and the carrying on of the said business of the said bankrupt.

And the said trustees are further authorized, empowered and directed to rent and lease, at such times when not needed in the carrying on of said business of said bankrupt, and in the completion of the said contracts of the said bankrupt, hereinbefore mentioned, and set up in said petition, for stated compensation and for stated times, such parts of the company's boats, derricks, cars, machinery and appliances, of any nature, as can be, without loss to the company's creditors dispensed with.

And the said trustees are further directed, empowered and authorized, to fully repair the plants and properties of the said company, for the purpose of carrying on the said business and for the purpose of completing the contracts set up in said proceedings; and the said trustees are further authorized and directed to pay the premiums accruing to sureties on bonds given for the performance of the contracts with the Government.

And the trustees are further directed, empowered and authorized to use the dredge-boat machinery now among the assets of the company, and with it, and such other parts as it may be necessary to acquire, repair and rebuild the dredge-boat of the company.

And the said trustees are further directed, empowered and authorized to prepare, present and prosecute in the Court of Claims of the United States, and wherever else it may be necessary, all the claims of the company now pending, or existing, against the United States, and to employ and pay counsel therefor, not in excess, however, of the sum of five hundred dollars ($500.00) as a retainer fee for the cases already pending, in the said court, and not in excess of 20% upon the claims realized, should there be contingent contract made with the counsel so employed, to prosecute such suits.

And the trustees are further directed, empowered and authorized to carry into full compliance and execution the present subsisting contracts, between the United States and The Evansville Contract Company, which are referred to in the petition of said trustees, and in order to fully execute the same, to buy material and hire labor and to pay for the same; to make all contracts necessary to carry the purpose of this order into final effect and to sub-let parts of the said work, whenever such sub-letting will be in the interests of the said estate, and to do all things necessary to be done to carry said contracts to full completion; to collect the contract price, together with all percentage retained by the United States, and to fully and

completely release and save harmless any and all sureties which may have guaranteed the completion of said contracts.

(Signed) GEO. E JOHNSON,
Referee in Bankruptcy.

A copy—Teste:

EXHIBIT E WITH BILL.

(Filed September 21, 1907.)

Memorandum of Agreement, Made this Eleventh Day of April, 1904, Between the United States Fidelity and Guaranty Company, a Corporation Under the Laws of Maryland, of the First Part, and the City National Bank of Evansville, Indiana, the First National Bank of Evansville, Indiana, the Citizens National Bank of Evansville, Indiana, the Second National Bank of Parkersburg, West Virginia, and the Farmers and Mechanics National Bank of Parkersburg, West Virginia, The Farmers Bank of Rockport, Indiana, The First National Bank of Rockport, Indiana, all Being Corporations, of the Second Part.

Witnesseth, That upon the execution and delivery unto the party of the first part by the parties of the second part of a bond
31 of the parties of the second part to idemnify and save harmless the said United States Fidelity and Guaranty Company, from all loss, charge, damage and liability heretofore accrued or hereafter accruing against it by reason of its suretyship or liability on four several bonds executed by the Evansville Contract Company to the Government of the United States or to its proper officers on which the party of the first part herein is surety, which bond of indemnity shall be in the aggregate sum of seventy-five thousand ($75,000) dollars, and each of the parties of the second part herein is to be bound thereby to pay such proportion of said sum of seventy-five thousand ($75,000) dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness held by them respectively—then, upon the delivery of such bond duly executed the party of the first part herein covenants and agrees as follows:

First. That the party of the first part will consent to the performance by the trustees appointed in bankruptcy in the District Court of the United States for the Northern District of West Virginia, for the estate and in the matter of the said Evansville Contract Company, bankrupt—of the contracts between the said Contract Company and the Government of the United States or its officers in the said bond to be mentioned and set forth.

Second. The party of the first part will consent to the payment to the said trustees of all moneys accrued and accruing under said contracts in the same manner and to the same extent that the said Evansville Contract Company would be entitled to receive the same if it had continued its business and had continued to perform the said contracts.

Third. The party of the first part will consent that under the orders of the said bankrupt court the said trustees may borrow money and issue trustees' certificates therefor, to such an amount as the court may authorize, and that moneys so borrowed and certificates so issued may be made a first lien upon the assets of the said bankrupt, and the party of the first part agrees generally that it will make and execute such consents, papers and writings as may be required of it as surety by the Government, to facilitate and to continue by the said trustees the performance of the business and contracts of said bankrupt and to enable the said trustees to prosecute and to finish such contracts and to enjoy all benefits that may flow therefrom and from the performance thereof.

32 Fourth. The party of the first part reserves the right and makes this contract with the understanding that it does not waive its right to collect the premiums on its several bonds as surety for the Evansville Contract Company, and also reserves the right to take such measures as it may be advised for the collection of such premiums, if default is made in the payment thereof.

In testimony whereof, the United States Fidelity and Guaranty Company has caused these presents to be executed on its behalf, signed in its name and sealed with its corporate seal at Baltimore, Maryland, this eleventh day of April, 1894.

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO.,
By JOHN R. BLAND, *President.*

Attest:

GEORGE R. CALLES, *Secretary.*

EXHIBIT F WITH BILL.

(Filed September 21, 1907.)

Know all men by these presents: That we, The City National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, The Second National Bank of Parkersburg, W. Va., The Farmers & Mechanics National Bank of Parkersburg, W. Va., The Farmers Bank of Rockport, Indiana, The First National Bank of Rockport, Indiana, all being corporations, are held and bound unto the United States Fidelity and Guaranty Company, a corporation existing under the laws of the State of Maryland, in the aggregate sum of seventy-five thousand ($75,000.00) dollars, and each of the said obligors binds itself severally and not for any other person, to pay such proportion of said sum of seventy-five thousand ($75,00-.00) dollars as the amount of this claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness, as shown below.

Sealed with our seals and dated this fourth day of April, 1904.

The condition of the obligation is such that whereas, the Evansville Contract Company, a corporation under the laws of Indiana,

and a debtor to above obligors, has entered into four several
33 contracts with the Government of the United States, through its appropriate officers, and the said Evansville Contract Company has given bonds for the performance of said contracts and for the payment of all persons supplying labor or materials in the prosecution of the work provided in said contracts, on each of which bonds, The United States Fidelity and Guaranty Company, as surety, which bonds are more particularly described as follows:

1. Bond executed September 19, 1903, in the penalty of fifty thousand ($50,000.00) dollars, covering contract for building Dam No. 3 in the Ohio river at Coraopolis, Pennsylvania.

2. Bond executed November 21, 1902, for ninety thousand ($90,000) dollars, covering building of Dam 18 in the Ohio river near Parkersburg, West Virginia.

3. Bond executed October 2, 1902, for thirty thousand ($30,000) dollars, covering building of Dam in the Congaree river, at Columbia, South Carolina.

4. Bond executed November 13, 1900, for thirty thousand ($30,000) dollars, covering building of Dam No. 2 in Big Sandy river, Kentucky.

A copy of each of said bonds is herewith filed as part hereof.

And whereas, After the work had been commenced under each of said several contracts, and partially completed, an order was made in the District Court of the United States for the Northern District of West Virginia, on the 27th day of February, 1904, adjudging the Evansville Contract Company to be a bankrupt, and

Whereas, On the 15th day of March, 1904, M. J. Bray, Alfred Heine and C. D. Dotson, were appointed trustees of the said Evansville Contract Company, in bankruptcy, and

Whereas, At a meeting of the creditors of said bankrupt, it was, on petition of said trustees, ordered, among other things, that the trustees should be authorized to conduct the business of the Evansville Contract Company and to finish the contract theretofore undertaken by the said bankrupt, and for that purpose to borrow money in amount not exceeding seventy-five thousand ($75,000) dollars, and to issue trustees' certificates therefor, and

Whereas, The undersigned creditors of said bankrupt believe it to be to the interest of the creditors that such contract be
34 finished by said trustees, and that monies be borrowed by the trustees according to the order or decree of the bankrupt court, and the United States Fidelity and Guaranty Company is unwilling that that course should be taken unless it be indemnified against any liability that has accrued, or may accrue, to it by reason of its being a surety of each of the bonds above mentioned

Now therefore, If the above bound obligors shall and will in all respects indemnify and save harmless the said United States Fidelity and Guaranty Company from all loss, charge, damage, and liability heretofore accrued, or hereafter accruing, against it by reason of its suretyship, or liability, on said bonds, and on each of them, then this obligation to be void; otherwise to remain in full force and virtue.

The debts and claims referred to, in this bond, for the purpose of reckoning the proportion above mentioned, are as follows:

The City National Bank of Evansville, Ind.	$5,000.00
The First National Bank of Evansville, Ind.	24,000.00
The Citizens National Bank of Evansville, Ind.	24,000.00
The Farmers & Mechanics National Bank of Parkersburg, W. Va.	20,000.00
The Second National Bank of Parkersburg, W. Va.	25,000.00
The Farmers Bank of Rockport, Ind.	10,000.00
The First National Bank of Rockport, Ind.	7,000.00
	$115,000.00

(Signed) THE CITY NATIONAL BANK OF EVANSVILLE, INDIANA.
By JAS. H. CUTLER, *V. Pt.*
THE FIRST NATIONAL BANK OF EVANSVILLE, INDIANA.
By JAS. H. CUTLER, *V. Pt.*
THE CITIZENS NATIONAL BANK OF EVANSVILLE, INDIANA.
By I. P. GILLETT, *Pres't.*
THE FARMERS BANK OF ROCKPORT, IND.,
By T. E. SNYDER, *Pres't.*
THE FIRST NATIONAL BANK OF ROCKPORT, IND.,
By E. M. PAYNE, *Pres't.*
35 THE FARMERS & MECHANICS NAT'L BK, PARKERSBURG, W. VA.,
By W. W. WALKER, *Pres.*
THE SECOND NATIONAL BANK OF PARKERSBURG, W. VA.,
By W. VROOMAN, *Pres't.*

A meeting of the Board of Directors of the City National Bank of Evansville, Indiana, was held at the banking house of said bank in the City of Evansville, in the State of Indiana, on the 6th day of April, 1904, at which, there was present the following directors: James H. Cutler, Thomas R. Garvin, Madison J. Bray, Otto F. Jacobi, George A. Cunningham, David Kroenenberger, Alfred F. Karges, and Francis A. Foster.

On motion, it was resolved and ordered that this bank join with The First National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, and the other obligors therein named in the execution of a certain bond bearing date the fourth day of April, 1904, given to the United States Fidelity and Guaranty Company of Baltimore, Maryland in the sum of seventy-five thousand dollars ($75,000), to indemnify it against loss or damage, by reason of its having executed a bond to the Government of the United States to secure the performance by the Evansville Contract

Company, of contracts for building certain Dams in the Ohio, Congaree, and Big Sandy rivers, and the Vice-President of this Bank is hereby authorized to execute said bonds in the name and on behalf of this bank and to attest the same with its corporate seal.

STATE OF INDIANA,
Vanderburgh County, ss:

I, Francis A. Foster, Cashier, of the City National Bank of Evansville, Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of a resolution of the Board of Directors of said Bank adopted at a meeting held at Evansville, Ind., on the sixth day of April, 1904.

In witness whereof, I have hereunto set my hand and the seal of said bank this sixth day of April, 1904.

(Signed) FRANCIS A. FOSTER,
Cashier of the City National Bank of Evansville, Indiana.

A meeting of the Board of Directors of The First National
36 Bank of Evansville, Indiana, was held at the banking house of said bank, in the city of Evansville, in the State of Indiana, on the sixth day of April, 1904, at which, there were present the following directors: James H. Cutler, Thomas E. Garvin, Madison J. Bray, Otto F. Jacobi, George A. Cunningham and David Kroenenberger.

On motion, it was resolved and ordered that this bank join with the City National Bank of Evansville, The Citizens National Bank of Evansville, Indiana, and the other obligors therein named, in the execution of a certain bond bearing date the fourth day of April, 1904, given to the United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of seventy-five thousand dollars ($75,000) to indemnify it against loss or damage by reason of its having executed a bond to the government of the United States to secure the performance by the Evansville Contract Company of contracts for building certain Dams in the Ohio, Congaree, and Big Sandy rivers, and the Vice-President of this bank is hereby authorized to execute said bond in the name and on behalf of this bank and to attest the same with its corporate seal.

STATE OF INDIANA,
Vanderburgh County, ss:

I, Francis A. Foster, Cashier of the First National Bank of Evansville, Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of a resolution of the Board of Directors of said bank adopted at a meeting held at Evansville, Indiana, on the sixth day of April, 1904.

(Signed) FRANCIS A. FOSTER,
Cashier of the First National Bank of Evansville, Indiana.

A meeting of the Board of Directors of the Citizens National Bank of Evansville, Indiana, was held at the banking house of said

bank, in the City of Evansville, in the State of Indiana, on the 4th day of April, 1904, at which there were present the following Directors: C. P. Bacon, I. W. Cook, H. E. Bacon, Samuel Vickery, E. Lauenstein, W. L. Swormstedt, S. P. Gillett.

On motion, it was resolved and ordered that this bank join with The City National Bank of Evansville, Indiana, The First National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, and the other obligors therein named in the execution of a certain bond bearing date the 4th day of April, 1904, given to the United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of seventy-five thousand
37 ($75,000) dollars to indemnify it against loss or damage by reason of its having executed a bond to the Government of the United States, to secure the performance by the Evansville Contract Company of contracts for building certain Dams in the Ohio, Congaree and Big Sandy rivers, and the President of this bank is hereby authorized to execute said bonds in the name and on behalf of this bank, and to attest the same with its corporate seal.

STATE OF INDIANA,
Vanderburgh County, ss:

I, W. J. Swormstedt, Cashier of the Citizens National Bank of Evansville, Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of a resolution of the Board of Directors of said bank adopted at a meeting held at their Evansville banking house on the 4th day of April, 1904.

In witness whereof, I have hereunto set my hand and the seal of said bank, this sixth day of April, 1904.

(Signed) W. J. SWORMSTEDT, *Cashier.*

A meeting of the Board of Directors of the Farmers Bank of Rockport, Indiana, was held at the banking house of said bank in Rockport, Indiana, in the State of Indiana, on the 5th day of April, 1894, at which there were present the following Directors Charles Lieb, Henry Kramer, John M. Gwaltney, John B. Charisney, Louis F. Weiss, George Wandel and Phil. J. Bretz.

On motion it was resolved and ordered that this bank join with the City National Bank of Evansville, Indiana, The First National Bank of Evansville, Indiana, and the other obligors therein named in the execution of a certain bond bearing date the 4th of April, 1905, given to The United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of seventy-five thousand dollars ($75,000.00) to indemnify it against loss or damage by reason of its having executed a bond to the Government of the United States to secure the performance by the Evansville Contract Company of contracts for building certain dams in the Ohio, Congaree, and Big Sandy rivers, and the President of this bank is hereby authorized to execute said bond in the name and on behalf of this bank and to attest the same with its corporate seal.

STATE OF INDIANA,
Spencer County, ss:

I, Henry Kramer, Cashier of the Farmers Bank of Rockport, Indiana, do hereby certify that the above and foregoing
38 is a full, true and complete copy of a resolution of the Board of Directors of said bank adopted at a meeting held at — on the 5th day of April, 1904.

In witness whereof, I have hereunto set my hand and the seal for said bank this — day of April, 1904.

(Signed) HENRY KRAMER,
Cashier Farmers Bank.

A meeting of the Board of Directors of "The First National Bank of Rockport" was held at the banking house of said bank in the town of Rockport, in the State of Indiana, on the 8th day of April, 1904, at which were present the following Directors: E. M. Payne, C. W. Hallbridge, L. F. Weiss, Henry Crowder, John G. Rimstedt, and William I. Rudd.

On motion, it was resolved and order- that this bank join with the City National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, and the other obligors therein named in the execution of a certain bond bearing date the 4th day of April, 1904, given to the United States Fidelity and Guaranty Company of Baltimore, Maryland, in the sum of seventy-five thousand dollars ($75,000.00) to indemnify it against loss or damage by reason of its having executed a bond to the Government of the United States to secure the performance of the Evansville Contract Company of contract for building certain dams in the Ohio, Congaree and Big Sandy rivers, and the President of this bank is hereby authorized to execute said bond in the name and on behalf of this bank and to attest the same with its corporate seal.

(Signed) E. M. PAYNE,
Pres. First National Bank of Rockport.

STATE OF INDIANA,
Spencer County, ss:

I, William I. Rudd, Cashier of the First National Bank of Rockport, Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the resolution of the Board of Directors of said bank adopted at a meeting held at Rockport on the 8th day of April, 1904.

In witness whereof, I have hereunto set my hand and the seal of this bank this 8th day of April, 1904.

(Signed) WILLIAM I. RUDD, *Cashier.*

39 A meeting of the Board of Directors of the Farmers and Mechanics National Bank of Parkersburg, West Virginia, was held at the banking house of said bank in Parkersburg, State of West Virginia, on the 2nd day of April, 1904, at which time there were present the following Directors: W. W. Walker, H. O.

Smith, D. A. Beatty, John N. Crawford, W. S. Tracewell and J. W. Solly.

On motion of John M. Crawford, the following resolution was adopted, all of the members of the Board present voting in the affirmative:

"Resolved, That the President of this bank be authorized to execute a bond in the penalty of seventy-five thousand dollars in connection with the four other banks as above stated in favor of the said United States Fidelity and Guaranty Company, which bond to be executed for the purpose of carrying into effect the agreement and understanding as set forth above, with the understanding that such bond be executed in such a manner that this bank will only be liable for its proportional portion of any loss that may result from its execution.

And resolved, further, that a copy of this resolution be certified by the cashier of this bank under its seal, to be attached to said bond when so executed by it."

STATE OF WEST VIRGINIA,
County of Wood, ss:

I, C. T. Hiteshew, Cashier of the Farmers and Mechanics National Bank of Parkersburg, W. Va., do hereby certify that the above and foregoing is a full, true and complete copy of the resolution of the Board of Directors of said bank adopted at a meeting held at Parkersburg on the 2nd day of April, 1904.

In witness whereof, I have hereunto set my hand and seal of the above bank this 11th day of April, 1904.

(Signed) C. T. HITESHEW, *Cashier.*

A "Special" meeting of the Board of Directors was held April 1, 1904, at 10 o'clock A. M. Present: W. Vrooman, H. P. Dils, W. T. Noland, Ben Nathan, H. S. Wilson, Joseph Good, Dennis O'Brien.

The cashier submitted the question of the bank's becoming surety on a bond in which certain Evansville Banks of Indiana and the Farmers and Mechanics Bank of this City were to join.

"On motion of Dennis O'Brien it was resolved and ordered that this bank does agree to execute and to become surety on a bond to be given by the City National Bank of Evansville, Indiana, and by this bank and others, in the aggregate sum of seventy-five thousand dollars to indemnify and save harmless The United States Fidelity and Guaranty Company as the surety on four several bonds, given *to* the Evansville Contract Company to the United States Government, the form of the bond to be executed by this bank being presented and read to and approved by the Board of Directors. And resolved, further, that W. Vrooman, the President of this bank, be and is hereby authorized and directed to execute said bond on behalf of the bank and to affix thereto its corporate seal and deliver said bond on behalf of the bank."

STATE OF WEST VIRGINIA,
County of Wood, ss:

I, E. M. Girkesn, Cashier of the Second National Bank of Parkersburg, W. Va., do hereby certify that the above and foregoing is a true copy of the resolution of the Board of Directors of said bank adopted at a meeting held at Parkersburg, on the 1st day of April, 1904.

In witness whereof, I have hereunto set my hand and seal of the above bank this 12th day of April, 1904.

(Signed) E. M. GIRKESN, *Cashier.*

EXHIBIT G WITH BILL.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

At Parkersburg, in said District, this 19th Day of November, 1904.

This cause came on this day to be heard upon all of the matters and things set forth in the notice sent out to all of the creditors of the said bankrupt, through the U. S. mails, at least ten days prior to this date, to their respective postoffice addresses, on November 1st, 1904, which said notice is in words and figures as follows, to-wit:

41 In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

To the Creditors of The Evansville Contract Co., of Parkersburg, in the County of Wood, and District Aforesaid, a Bankrupt:

Notice is hereby given, That on the 27th day of February, A. D. 1904, the said The Evansville Contract Co., was duly adjudicated bankrupt; and that a meeting of its creditors will be held at the law offices of Geo. W. Johnson, in the City of Parkersburg, W. Va., on the 19th day of November, 1904, at 10 o'clock in the forenoon, at which time the said creditors may attend, prove their claims,

Pass upon the petition of the Trustees filed herein, October 27, 1904, asking authority to dispose of, at public or private sale, 4 mules and 3 horses now located at Lock 18 on the Ohio river.

Pass upon the petition of the Trustees filed herein September 24, 1904, asking authority to compromise for $200.00 the suit of Curtis Odell, etc., against the bankrupt, now pending in the Circuit Court of Boyd county, Kentucky.

Pass upon the petition of R. J. Armstrong claiming $1,000.00 out of the funds realized out of the contract of Congaree river, S. C., to which an answer of the Trustees has been filed.

Take up and consider the question of allowing certain attorneys' fees mentioned in the debts proven herein raised by the exceptions of the Trustees filed thereto as follows:

Claim of the Peoples Savings Bank, Evansville, Ind., $5,000.00; The Citizens National Bank, Evansville, Ind., $3,369.05; The Citizens National Bank, Evansville, Ind., $6,649.68; The Citizens National Bank, Evansville, Ind., $10,418.88; The Citizens National Bank, Evansville, Ind., $5,380.43; The City National Bank, Evansville, Ind., $5,347.50; Alexander Gilchrist, Evansville, Ind., $2,127.30; Alexander Gilchrist, Evansville, Ind., $836.30; Mrs. Tessie Lowenthal, Evansville, Ind., $1,000.00; John Biedenkoph, Grandville, Ind., $2,681.51; Cannelton State Bank, Cannelton, Ind., $8,080.65; The Old National Bank, Evansville, Ind., $10,627.66; The Old National Bank, Evansville, Ind., $5,021.36; The Farmers Bank,
42 Rockport, Ind., $10,764.83; First National Bank, Rockport, Ind., $7,425.94; and The First National Bank, Evansville, Ind., $25,276.40.

Pass upon the allowance of the claims which have been excepted to by the Trustees herein, as follows:

Claims of Chas. Lieb, Rockport, Ind., $2,544.50; Tessie H. Lowenthal, Evansville, Ind., $1,000.00; and John G. Eigenmann, Rockport, Ind., $450.00.

Depositions in support of and against said claims will be taken at this time and any other matters that parties in interest may desire to submit in reference to said claims, will be considered at this meeting.

Consider, hear and pass upon the petition of the Trustees herein claiming that there are in the possession of Chas. Lieb and Louis P. Eigenmann, a certain ledger, journal and cash book of the said bankrupt, which the said Lieb and Eigenmann refuse to turn over to the said Trustees.

Examine Jacob Eichel, President of the said The Evansville Contract Company.

And transact such other business as may properly come before said meeting.

GEO. W. JOHNSON,
Referee in Bankruptcy.

Parkersburg, W. Va., November 1, 1904.

And thereupon, at the time and place mentioned in said notice, there appeared the following interested parties:

V. B. Archer, Esq., counsel representing petitioning creditors.

J. A. Dupuy, Esq., and Philip W. Frey, Esq., counsel representing the Trustees.

Mr. M. J. Bray, Mr. C. D. Dotson and Mr. Alfred Heine, Trustees.
Mr. R. J. Armstrong, in person.
Capt. John G. Eigenmann, in person.

Thereupon, the petition of the Trustees, filed herein, on Oct. 27th, 1904, asking authority to dispose of, at public or private sale, four mules and three horses, now located at Lock No. 18, on the Ohio river, was called up for consideration and there being no exceptions to the consideration thereof, and no answer or other papers of the Trustee or other persons filed in opposition to the prayer of said petition, and all parties appearing favoring the sale of the said mules and horses, on consideration whereof it is ordered that the Trustees hereinbefore mentioned do forthwith proceed to sell the said four mules and three horses now located at Lock 18, on the Ohio river,
13 either at public or private sale, as in their judgment may seem to the best advantage, and the said Trustees are directed to report said sale of said horses and mules immediately upon the consummation of the same, for the purpose of having the said sale confirmed, or rejected, as may seem proper upon a hearing of said report of sale.

And thereupon the petition of the trustees filed herein, September 24th, 1904, asking authority to compromise for $200.00, the suit of Curtis Odell, etc., against the bankrupt, now pending in the Circuit Court of Boyd county, Kentucky, was called up for consideration, and none of said parties hereinbefore reported as present objecting to the consideration of the same and no one offering any resistance thereto, or filing an answer to said petition, denying the prayer of said petition, on consideration whereof, it is ordered that the said Trustees do pay to Curtis Odell, or any person authorized to receive the same, the said $200.00, in full liquidation and discharge of the said suit, and the claim set up therein, as aforesaid, and report their action herein to this court.

And thereupon the petition of R. J. Armstrong, claiming $1,000.00 out of the funds realized out of the contract on Congaree river, S. C., to which petition an answer, of the Trustees has been filed, was called up for consideration and thereupon appeared R. J. Armstrong and gave testimony concerning his said claim of $1,000.00. Thereupon appeared Alfred Heine, a witness for the said R. J. Armstrong, as well as C. D. Dotson, and gave their testimony concerning said claim, all of which said testimony has been filed herein.

And thereupon the said petition and answer and depositions were submitted to the court for its decision.

And the court having taken the same and on consideration whereof, being of opinion that the said R. J. Armstrong should recover the said $1,000.00, it is ordered that the said Trustees hereinfore mentioned, do pay to the said R. J. Armstrong the said $1,000.00 out of the proceeds and profits realized in the construction of the said dam on the said Congaree river, and report their action herein to this court.

And thereupon the question of allowing certain attorneys' fees

mentioned in the debts proven herein raised by the exceptions of the Trustees filed hereto as follows, was called up for consideration:

Claim of The People Savings Bank, Evansville, Ind., $5,000.00; The Citizens National Bank, Evansville, Ind., $3,369.05; The Citizens National Bank, Evansville, Ind., $6,649.68; The Citizens National Bank, Evansville, Ind., $10,418.88; The Citizens National Bank, Evansville, Ind., $5,380.43; The City National Bank, Evansville, Ind., $5,347.50; Alexander Gilchrist, Evansville, Ind., $2,127.30; Alexander Gilchrist, Evansville, Ind., $836.30; Mrs. Tessie H. Lowenthal, Evansville, Ind., $4,000.00; John Biedenkoph, Grandview, Ind., $2,681.51; Cannelton State Bank, Cannelton, Ind., $8,080.65; The Old National Bank, Evansville, Ind., $10,627.66; The Old National Bank, Evansville, Ind., $5,021.36; The Farmers Bank, Rockport, Ind., $10,764.83; First National Bank, Rockport, Ind., $7,425.94; and the First National Bank, Evansville, Ind., $25,276.40.

And thereupon a stipulation was presented to the court and filed by the following named creditors:

The Peoples Savings Bank, Evansville, Ind.	$5,000.00
The Citizens National Bank, Evansville, Ind.	3,369.05
The Citizens National Bank, Evansville, Ind.	6,649.68
The Citizens National Bank, Evansville, Ind.	10,418.88
The Citizens National Bank, Evansville, Ind.	5,380.43
The City National Bank, Evansville, Ind.	5,347.50
Alexander Gilchrist, Evansville, Ind.	2,127.30
Alexander Gilchrist, Evansville, Ind.	836.30
Mrs. Tessie H. Lowenthal, Evansville, Ind.	4,000.00
The Old National Bank, Evansville, Ind.	10,627.66
The Old National Bank, Evansville, Ind.	5,021.36
The First National Bank, Evansville, Ind.	25,275.40

withdrawing and releasing any claim for attorney fees, as mentioned in said proofs of claims.

On consideration whereof, it is ordered that no attorneys' fees be allowed, as proven and set up in the last mentioned claims, and that the attorney fees set up in the said respective last mentioned claims be expunged from said respective last mentioned proofs of claims.

And thereupon Capt. J. G. Eigenmann, claiming to represent W. C. Mason, Esq., as well as himself, appeared and asked the court to continue the hearing of the matters arising upon the claim of the Cannelton State Bank, Cannelton, Ind., the Farmers Bank, Rockport, Ind., The First National Bank, Rockport, Ind., and John Biedenkoph, Grandview, Ind., which said claims are represented by the said W. C. Mason, Esq., herein, and the court having received a letter from W. C. Mason, Esq., asking that said hearing on said claims, in so far as claim for attorney fees is herein set up, be continued until the further order of the court.

On consideration whereof, it is ordered that a hearing on said claims, in so far as the claim for attorney fees is herein set up, be continued until the — day of December, 1901, at the law offices of George W. Johnson, in the city of Parkersburg, West Virginia.

And it is further ordered that the said W. C. Mason shall prepare such briefs as he may desire in support of the
45 allowance of said attorney fees on or before that date and submit a copy thereof to counsel representing the trustees; and leave is given the said W. C. Mason to amend the proofs of claims in such particulars as he may desire, and is required to send a copy of such amendment to counsel for the Trustees, said amendment to be made and filed on or before the said — day of December, 1904.

And thereupon the allowance of the claims which have been excepted to by the Trustee herein, as follows: Claim of Chas. Lieb, Rockport, Ind., $2,544.50; Tessie H. Lowenthal, Evansville, Ind., $4,000.00; John G. Eigenmann, Rockport, Ind., $450.00, was called up for consideration and thereupon appeared John G. Eigenmann, representing himself, and at the same time stating he was appearing in behalf of W. C. Mason, attorney representing Chas. Lieb and Tessie H. Lowenthal, and moved the court that the question of allowance of said claims be continued so as to enable the said W. C. Mason to be present, when the same were considered.

In consideration whereof, it is ordered that the consideration of the allowance of said claims be continued until the — day of December, 1904, at the law offices of George W. Johnson, in the City of Parkersburg, West Virginia.

And thereupon the petition of the Trustees herein, claiming that there are in the possession of Chas. Lieb and Louis P. Eigenmann, a certain ledger, journal and cash book, of the said bankrupt, which the said Lieb and Eigenmann refuse to turn over to the said Trustees, was called up for consideration and the said Trustees, through their attorneys, Frey and Dupuy, announced they were ready to submit to the court certain witnesses in behalf of the allegations of the said petition, and thereupon the said John G. Eigenmann again appeared and said he was representing the said W. C. Mason and moved the court for a continuance of the hearing of the said petition until some future date; and thereupon said Eigenmann was examined in open court as to the continuance of this matter and the court, after having considered said testimony of said Eigenmann, in relation to the said continuance, and letter of said W. C. Mason, filed along with said deposition, as an exhibit, is of opinion to permit said Trustees to submit their witnesses for examination, in relation to said petition.

And thereupon the said trustees presented, as witnesses, Alfred Heine, C. D. Dotson and C. H. Wright, who being first duly sworn, testified in behalf of said petition, in relation to said books, and after said testimony was had and taken, the said Trustees said they
46 desired to have other witnesses testify in relation to said petition and the allegations therein and moved the court for time to present said witnesses, in relation thereto.

And the court considering said motion of said Eigenmann and the said Trustees, for a continuance, is of opinion to continue the hearing on said petition until the — day of December, 1904, for the purpose of permitting the said Lieb and the said Louis P. Eigen-

mann to file their answer to said petition, if they so desire, and at the same time to produce such witnesses in relation thereto as they, or each of them, may desire and likewise for the said Trustees to produce what witnesses they may desire in support of their said petition and the allegations therein contained.

And thereupon Jacob Eichel, President of the said company, presented himself for examination and no party at this time desiring to examine the said Eichel, the examination thereof is continued until some future order of this court, if it should turn out that an examination of said Eichel should be found to be necessary.

And thereupon the Trustees called up for consideration the claims which have been filed herein, as preferred ones, and examined Jacob Eichel and Alfred Heine for the purpose of ascertaining the preferred claims filed herein, about which there is no controversy.

And it appearing from said testimony that the following claims are preferred claims, in this bankruptcy, and the same are so established in this decree, as claims of that character:

D. A. Rardin, Athens, O.	$327.00
Duncan & Porter Co., Allegheny, Pa.	460.00
Riter-Conley Co., Pittsburg, Pa.	4,858.25
The Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59
The Monongahela River Consolidated Coal & Coke Co., Pittsburg, Penna.	4,582.98
Pittsburg Trolley Pole Co., Pittsburg, Pa.	634.20
The Nicola Brothers Co.	1,199.77
C. D. Dotson, Parkersburg, W. Va.	2,084.08
C. C. Martin & Co., Parkersburg, W. Va.	372.15
The Variety Iron Works, Cleveland, O.	7,348.00
E. L. Oles.	148.20
Southeastern Lime and Cement Co.	2,806.00
Clydesdale Stone Company, Pittsburg, Pa.	6,185.35
Withers & Van Devender, Parkersburg, W. Va.	3,000.00
E. K. Neale, Ben Lomond, W. Va.	1,045.50
Lombard Iron Works, Augusta, Ga.	2,107.82

47 EXHIBIT H WITH BILL.

(Filed September 21, 1907.)

EVANSVILLE, INDIANA, *December* 12, 1904.

To M. J. Bray, as Trustee of the Evansville Contract Company, in bankruptcy:

Whereas, I am the owner by assignment of the following claims, which claims are duly proved in bankruptcy in the estate as above, before the Honorable George W. Johnson, Referee in Bankruptcy for the Northern District of West Virginia, and, whereas, the same are established as preferred claims and payable out of the assets of said estate, first, after the costs of administration and before general claims shall be allowed to participate in any distribution, which said

preference was established by decree of the said referee, under date of November 19th, 1904.

And, whereas, the same are attached as collateral to a number of notes given to the City National Bank of Evansville, Indiana, by the undersigned.

Now, therefore, I hereby direct and order you, after the payment of said notes in said City National Bank, to which said claims are attached as collateral security, to pay over to said City National Bank, in addition to the amount represented by my said notes, as aforesaid, one-half of the remainder of the amount of said claims which may be due and payable to me by reason of my ownership thereof, which half amounts at this day to about $4,500.00, it being understood that certain amounts advanced by M. J. Bray to said Philip W. Frey for the payment of the purchase price of some of the claims hereinafter mentioned shall also be first paid to said Bray together with the money due the City National Bank upon the notes aforesaid to which collateral is attached, before the order herein to pay the balance due me shall be effective.

The following is a list of said claims and the amounts due thereon:

L. Cramer & Son, Parkersburg, W. Va.	$455.69
D. A. Rardin, Athens, O.	327.00
Duncan & Porter Co., Allegheny, Pa.	460.00
The Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59
The Monongahela River Consolidated Coal and Coke Co., Pittsburg, Penna.	4,582.98
C. D. Dotson, Parkersburg, W. Va.	2,084.08
C. C. Martin & Co., Parkersburg, W. Va.	371.15
48 The Variety Iron Works, Cleveland, O.	7,348.00
E. L. Oles	148.20
Southeastern Lime and Cement Co.	2,806.00
Clydesdale Stone Company, Pittsburg, W. Va.	6,185.35
Withers & Vandevender, Parkersburg, W. Va.	3,000.00
E. L. Neale, Ben Lomond, W. Va.	1,045.50
Lombard Iron Works, Augusta, Ga.	2,107.82

Executed in duplicate.

PHILIP W. FREY.

EXHIBIT I WITH BILL.

(Filed September 21, 1907.)

Law Offices Lyon, Hunter & Burke,
Berger Building, Pittsburg.

Walter Lyon, John P. Hunter, James Francis Burke, S. Schoyer, Jr., Harrison Bock, George J. Shaffer, Wm. E. Schoyer, Herbert R. Hahn.

SEPT. 12TH, 1907.

B. M. Ambler, Esq., 308 Juliana Street, Parkersburg, W. Va.

DEAR SIR: Yours of the 10th just received. The following are the cases in the United States Circuit Court for the Western District of Pennsylvania:

Nos. 24 and 25, November term, 1907, original claimant the Clydesdale Stone Company, work done and bond given covering dams Nos. 3 and 5, respectively.

No. 42, November term, 1907, claimant Southeastern Lime & Cement Company. Bond covers work done on dam in Congaree river, near Columbia, South Carolina.

No. 43, November term, 1907, claimant E. L. Neale. Bond covers dam No. 18 in Ohio river.

No. 44, United States. Bond on dam in Congaree river, near Columbia, South Carolina. Claimant Lombard Iron Works.

49 No. 45, original claimant The Pittsburg Trolley Pole Company. Bond covers work on dam in Congaree river.

No. 46, claimant C. D. Dotson. Bond covers dam No. 18.

No. 47, claimant Clydesdale Stone Company. Bond covers work on dam No. 3 in Ohio river.

No. 48, claimant C. C. Martin & Co. Bond covers work on dam No. 18.

No. 49, claimant Nicola Brothers. Bond covers work on dam No. 18.

No. 50, claim of Duncan & Porter Company. Bond covers work on dam No. 3 Ohio River.

No. 48, claimant C. C. Martin & Co. Bond covers work on dam No. 18.

No. 52, claimant Monongahela River Consolidated Coal & Coke Company. Bond covers work on dam No. 3.

No. 53, claimant Parkersburg Mill Company. Bond covers work on dam No. 18.

No. 54, claimant E. L. Oles. Bond covers work on dam No. 3.

No. 55, claimant Monongahela River Consolidated Coal & Coke Company. Bond covers work on dam No. 18.

No. 56, claimant J. H. Webster, Assignee of the Variety Iron Works. Bond covers work on dam No. 3.

No. 57, claimant Withers & Van Devender. Bond covers work on dam No. 18.

All the above cases are styled as follows:

UNITED STATES OF AMERICA for Use of (Here Giving the Name of Original Plaintiff as Cited Above), Then for Use of Philip W. Frey and now for Use of Laura Eichel,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation.

The claims sued for in above cases Nos. 24 and 25, were not sued for in the Common Pleas Court No. 2, but were brought originally in the Circuit Court, and are now at issue and will be tried this November, unless we can have them stayed. The cases in the Common Pleas of Allegheny County, are as follows:

50 No. 869—Parkersburg Mill Company. Dam No. 18.

" 870—J. H. Webster, Assignee of the Variety Iron Works Co. Dam No. 3.

No. 871—Clyesdale Stone Company. Dam No. 3.
" 872—The Duncan & Porter Company. Dam No. 3.
" 873—E. L. Oles. Dam No. 3.
" 874—E. L. Neale. Dam No. 18.
" 875—C. C. Martin & Co. Dam No. 18.
" 876—The Withers & Van Devender Co. Dam No. 18.
" 877—L. Cramer & Son. Dam No. 18.
" 878—C. D. Dotson. Dam No. 18.
" 879—Nicola Brothers Co. Dam No. 18.
" 880—Lombard Iron Works. Dam on Congaree river.
" 894—Pittsburgh Trolley Pole Company. Dam on the Congaree river.
" 895—Monongahela River Consolidated Coal & Coke Company. Dam No. 3.
" 896—Monongahela River Consolidated Coal & Coke Company. Dam No. 18.
" 897—Southeastern Lime & Cement Company. Dam on Congaree river.

Very truly yours,

LYON, HUNTER & BURKE.

EXHIBIT K WITH BILL.

(Filed September 21, 1907.)

$27,037.39. EVANSVILLE, IND., *Dec.* 31, 1906.

On demand after date, we or either of us, promise to pay to the Order of M. J. Bray twenty-seven thousand and thirty-seven & 39-100 dollars with attorney's fees; negotiable and payable at The City National Bank, of Evansville, Ind., for value received, without relief from valuation or appraisement laws, with three per cent. interest after date, payable semi-annually.

LAURA EICHEL.
J. EICHEL.

Due —.

51

EXHIBIT L WITH BILL.

(Filed September 21, 1907.)

Laura Eichel having bought the following claims for material against "The Evansville Contract Co.," in bankruptcy:

(The claim on the left represents the par value of the said claims and the column on the right the price paid by the said Laura Eichel for the same.)

Lombard Iron Works, Augusta, Ga.....	$2,166.30	$1,582.37
Variety Iron Works, Cleveland, O.....	7,348.00	5,878.40
Clydesdale Stone Co., Pittsburgh, Pa.....	6,185.33	3,606.30

C. D. Dotson, Parkersburg, W. Va.....	2,084.08	1,771.47
The Monongahela R. C. C. & C. Co., Pittsburg.....	4,582.98	2,291.49
The Duncan & Porter Co.....	460.00	368.00
Wickers & Vandevender, Parkersburg, W. Va.....	3,000.00	2,797.42
E. L. Neal.....	1,045.50	942.35
E. L. Oles, Pittsburg.....	148.20	133.38
S. E. Lime & Cement Co., Charleston S. C.....	2,806.00	2,500.00
C. C. Martin & Co., Parkersburg, W. Va....	372.15	334.94
Kramer & Son, Parkersburg, W. Va.....	459.69	321.74
Parkersburg Mill Co., Parkersburg, W. Va...	5,005.59	4,509.53
	35,663.82	27,037.39

Now in consideration of M. J. Bray furnishing her the money to buy these claims, and at the low rate of interest of three (3%) per cent., for which money the said Laura Eichel has this day executed to M. J. Bray, a note for $27,037.39, due on demand, with attorney fees, negotiable and payable at the City National Bank of Evansville, Indiana, without release from valuation or appraisement laws, with three (3%) per cent. interest per annum from date, payable semi-annually, and endorsed by Jacob Eichel.

It is hereby understood and agreed that the said claims now in the hands of Hall & Metcalf, attorneys, for collection, shall be held by the said Bray, who is to receive all money collected from said claim, and after said note and interest is fully paid, Bray is to retain as his share of the interest and profits of this transaction,
52 one-half (½) of all the money received by him from said claims over and above the face of this note. The balance he is to apply to any indebtedness due to him by Laura Eichel, and in case there is no such indebtedness, either direct or by endorsement, to pay the balance to the said Laura Eichel.

LAURA EICHEL.
M. J. BRAY.

EXHIBIT M WITH BILL.

(Filed September 21, 1907.)

EVANSVILLE, IND., —— —, 190–.

Madison J. Bray, 312½ South First St., Hall and Metcalf, Attys.

GENTLEMEN: You will please pay to M. J. Bray all money collected by you on my claims against the Evansville Contract Co., Bankrupt.

LAURA EICHEL.

Exhibit N with Bill.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern Division of West Virginia.

In Bankruptcy.

In the Matter of Evansville Contract Company, Bankrupt.

To the Honorable George W. Johnson, Referee:

The petition of the United States Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, respectfully shows:

First. That prior to the adjudication in bankruptcy of the said bankrupt, your petitioner became surety for the Evansville Contract Company on several bonds executed by the bankrupt under contracts with the United States Government for the construction of certain Government works, which bonds were executed under the Act of Congress, as follows:

53 1. A contract for the construction of Dam No. 18 in the Ohio river, dated November 21, 1902. The bond on this contract was in the penalty of ninety thousand dollars.

2. A contract for Dam No. 3, dated September 19, 1903. The bond on this contract was in the penalty of fifty thousand dollars.

3. A contract for the construction of Dam across the Congaree river near Columbia, South Carolina, dated October 2, 1902. The bond on this contract was in the penalty of thirty thousand dollars.

4. A contract for the construction of Dam No. 2 in the Big Sandy river, dated November 13, 1900. The bond on this contract was in the penalty of thirty thousand dollars.

Second. Your petitioner shows that each of said bonds was conditioned that the Evansville Contract Company shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contracts agreed and convenanted by the said Evansville Contract Company to be observed and performed—and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contracts.

Third. Your petitioner believes that several persons have supplied labor and materials in the prosecution of the work provided for in each of said contracts; and that the holders and owners of claims on that account and of that class have been proved in the above entitled matter; but your petitioner does not know and can not state the facts in regard thereto, nor does your petitioner know the names of the holders of such claims, nor the amounts to which they are actually entitled, constituting a liability on your petitioner's bonds as surety.

Fourth. Prior to the giving of each of the bonds above mentioned,

the Evansville Contract Company made application to your petitioner to become surety on such bonds upon printed forms—usual and regular—according to petitioner's requirements in such cases. And it also executed unto your petitioner an agreement of indemnity agreeing, amongst other things, to indemnify your petitioner against all loss, costs, damages, charges and expenses whatsoever, resulting from any of the acts, default or neglect that your petitioner might sustain or incur by reason of its having executed such bonds
54 or any continuation thereof; and the bankrupt further agreed "That in the event of its being unable to complete or carry on the afore-mentioned contracts, to assign and does hereby assign such plant as it may own or have upon said work," unto your petitioner. After these several applications and contracts of indemnity had been executed to your petitioner, and in consideration thereof, your petitioner became surety on each of said bonds respectively; but your petitioner cannot produce the originals of such paper for the reason that the same were destroyed with some other papers and property of your petitioner in the Great Fire which occurred in the City of Baltimore in February, 1904; and your petitioner annexes hereto, as part hereof, as Exhibit "A," the form of such indemnity agreement and application, an original of which, duly executed, was given by the bankrupt to your petitioner prior to and in consideration of the execution of each of the bonds.

Fifth. Your petitioner charges that by virtue of said contract of indemnity it acquired a lien by the terms thereof upon all of the plant and property of the bankrupt at and about each of the several dams respectively or owned by the bankrupt as set forth in the contracts; and your petitioner also has a lien upon all funds and moneys earned by or arising from said contracts in the hands of the Government of the United States and due and owing under the said several contracts of construction, and that each of these liens was in existence at the time of the adjudication in bankruptcy and still continues, at least, so far as may be necessary for the indemnity of your petitioner, upon any and all liability whatever arising upon each and all of said bonds.

Sixth. Upon the 27th day of February, 1904, The Evansville Contract Company was adjudicated a bankrupt, and since that time, as shown by the record, its plant and property has been sold and disposed of under orders of the court. The amount arising from the sales of plant in and about Dam No. 18, being about $61,000.00; at other places being about $3,000, making a total amount arising from the sales of plant, $63,000.00, more or less, as shown by the record.

Seventh. The Evansville Contract Company became unable "to complete or to carry on" any of the construction contracts above-mentioned, and your petitioner's lien had thereby fully attached to its property and assets.

Eighth. After an adjudication was made, the creditors of the bankrupt elected M. J. Bray, C. D. Dotson and Alfred Heine,
55 Trustees, and these trustees filed their petitions before the referee upon the hearing of which an order was entered on

the 11th day of April, 1904, authorizing the trustees to conduct the business of the bankrupt and to borrow money upon certificates issued by them, and to pay the premiums accruing to sureties on bonds given to the Government and to perform and complete the contracts existing between the bankrupt and the United States; to collect the contract price, and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of the contracts.

Ninth. The liabilities and indebtedness of the bankrupt exceeded two hundred thousand dollars, and among the creditors were many banks that held no security for their debts, and no means of realizing their money except from the bankrupt estate. The report filed by the trustees and referred to in the order of April 11, 1904, purported to set forth the condition of the estate and suggested that large profits could be realized from the completion of the construction contracts then in an unfinished state. Prior to the making of the order of April 11, 1904, and after it had become known that a number of persons claimed that large amounts of money were due to them for materials furnished and labor performed in the prosecution of the several construction contracts aforesaid, your petitioner had concluded that unless it was indemnified against loss from a continuation of the business that your petitioner would assert its rights as surety and take charge of the work at each place and of the plant and property appearing thereto, and would avail itself of all rights for its protection under the law; and thus negotiations were commenced on the part of certain of the general creditors who desired the opportunity to reap whatever benefit might arise from the completion of the contracts by the trustees in bankruptcy, and it was finally agreed that upon an indemnity being furnished to your petitioner in the manner hereinafter set forth, then your petitioner would consent that the trustees should perform the contracts mentioned and would consent to the payment to the trustees of all moneys derived therefrom, and that the trustees might issue certificates as a first lien upon the assets, and that your petitioner would facilitate the performance of the business and contracts of the bankrupt so as to enable the trustees to finish the same.

Accordingly, under date of the 4th day of April, 1904, the City National Bank of Evansville, Indiana, the First National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, The Second National Bank of Parkersburg, West Vir-
56 ginia, The Farmers & Mechanics National Bank of Parkersburg, West Virginia, The Farmers Bank of Rockport, Indiana, and the First National Bank of Rockport, Indiana, all corporations, executed their bond unto your petitioner in the aggregate sum of seventy-five thousand dollars, "Each of the said obligors binding itself severally and not for any other person, to pay such proportion of said sum of seventy-five thousand dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims, as shown below," and this agreement duly executed under the respective seals of the said banks and upon the full authority of the several Boards of

Directors, recited the execution of the said several bonds above mentioned by your petitioner as surety, and recited the adjudication in bankruptcy, the appointment of trustees, the direction at a creditors' meeting that the trustees be authorized to finish the contracts and to borrow money to the amount of seventy-five thousand dollars, and to issue certificates therefor, reciting further that the said banks believed it to be to the interest of the creditors that the contracts be finished; and that your petitioner is unwilling that that course should be taken unless it be indemnified against any liability that has accrued or may accrue to it, by reason of its being a surety on each of the bonds above mentioned. The said bond was conditioned "to indemnify and save harmless the United States Fidelity & Guaranty Company from all loss, charge, damage and liability heretofore accrued or hereafter accruing against it by reason of its suretyship or liability on said bonds, and on each of them." The respective claims of each of the obligors was then given, aggregating one hundred and fifty thousand dollars, and that bond is duly and formally sealed and executed by the proper officers, and the records of the same by their Board of Directors were duly certified, and the said bond thus executed was delivered to your petitioner, a copy of which is herewith filed, marked "Exhibit B" made part hereof, and the original will be produced when required by the court.

Tenth. Your petitioner has at no time brought any proceedings as a party to the record, or taken part in any of the meetings or transactions had before the Referee, nor has your petitioner been notified by the Referee of any such proceeding.

Eleventh. After the order was made on April 11, 1904, the trustees did issue certificates to a large amount, and they did take charge of the property and proceed to execute and complete the contracts, and it appears from the reports and statements filed before the Referee that the Trustees have completed in full all of the several dams referred to which were incomplete at the time of the bankruptcy, and many thousands of dollars have been realized and received by the trustees under said contracts from the Government of the United States. It further appears from the reports of the trustees, to which reference is now made for greater accuracy, that the amount or balance unpaid in the hands of the Government in December, 1905, was about thirty-six thousand dollars; that the proceeds of sale from plant and property sold was about sixty-three thousand dollars, and the outstanding certificates and interest were about sixty-three thousand dollars, which would make a net balance in the hands of the trustees, after paying certificates, as of December 19, 1905, of about thirty-six thousand dollars, and this balance was subject to court costs and costs of the trustees and counsel and others. Several petitions have been filed asking allowances out of this fund of thirty-six thousand dollars:

Trustee Dotson, asking	$8,000.00
Trustee Bray	5,000.00
Trustee Heine (in addition to $2,750.00 salary)	500.00

SE IN CENTER

Jacob Eichel, paid counsel	$600.00	
Personal services	500.00	
		1,100.00
Counsel for the receivers		8,000.00
The above items aggregating		$22,600.00

And all of said claims are being asserted and contested at this time, February, 1906, before the Referee.

It appears by an order made by your honor on the — day of November, 1904, that certain claims were listed as being for materials and labor having a preference on the funds and property of the bankrupt estate, and the list, of which a copy is hereto annexed, marked "Exhibit C," appears on the records of the Referee; but your petitioner does neither affirm nor deny the correctness of any one of said claims and reserves the right to attack or to defend against each and all of them if so advised, in case any demand is made upon your petitioner on account thereof, or in case any recourse is sought by any of them upon your petitioner's bond; and yet your petitioner believes that of those claims, the amount of such as are entitled to recourse against your petitioner under its bond and under the Act of Congress, will, including interest, amount to thirty thousand dollars and that the whole amount of money in the hands of the court after the payment of fees and allowances will not be sufficient to satisfy the claims of that class, and your petitioner again charges that it has a lien upon all of said funds for its indemnity, and it is ad-
58 vised that equity will protect such lien. Your petitioner further shows that it is probable that the amount of money that will finally be in the hands of the court for distribution amongst claimants and creditors will not be sufficient to pay those claims and creditors who are entitled to have recourse upon your petitioner's bond, and that there will be a deficiency of such funds for which your petitioner must look to the said several banks for its indemnity under their bond, and thus each of said indemnitor banks is interested in the distribution of said fund and in the protection of their interests in the premises.

Each of said banks has proved its claim as a creditor, and this Honorable Court has jurisdiction of them. Each of them has been notified of the several steps and proceedings and transactions occurring before the Referee and has participated in the meetings of creditors, in the issuance of Receiver Certificates, and in all things had and done in the matter of said bankruptcy.

Twelfth. The contracts between the Evansville Contract Company and the United States have heretofore been filed and referred to with the petition of the trustees, under date of March, 1904, and your petitioner will procure and file authenticated copies of said contracts and of the bonds given to the Government as soon as the same can be procured, to be made part hereof.

Thirteenth. Your petitioner is advised that it is entitled to intervene here and assert its lien on the fund in the hands of the court and to require that the fund in the court's hands shall be applied to

the satisfaction of the debts and claims of the bankrupt for which this petitioner is liable; and also to obtain the protection of the court for the rights of your petitioner and of its several indemnifying banks above named.

Wherefore, your petitioner prays that it may be permitted to file its petition; that Madison J. Bray, C. D. Dotson and Alfred Heine, trustees of the Evansville Contract Company, may be made parties defendant hereto, and that the said City National Bank of Evansville, Indiana, the First National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, The Second National Bank of Parkersburg, West Virginia, The Farmers & Mechanics National Bank of Parkersburg, West Virginia, The Farmers Bank of Rockport, Indiana, and the First National Bank of Rockport, Indiana, all being corporations, may be made parties defendant hereto, that notice of this petition may be given to each of them; that
59 the rights and lien of your petitioner may be respected and enforced upon the *funds* in the hands of the trustees, and under the control of this honorable court; that the court will ascertain what persons hold claims for materials furnished and labor performed in the prosecution of the several contracts above mentioned, and what persons are entitled to enforce any liability upon any of the bonds executed by your petitioner, and that the court will ascertain the amount of such claims and cause the funds in the hands of the court to be applied upon such claims and in satisfaction thereof, and that the court will make such other, general and further orders and grant such other relief in the premises as may be meet and proper to the protection of all interests concerned.

UNITED STATES FIDELITY & GUARANTY CO.,
[CORPORATE SEAL.] RICHARD D. LAND,
3rd Vice-President.

VAN WINKLE & AMBLER,
Parkersburg, W. Va., Attorneys.

CITY OF BALTIMORE,
State of Maryland, To wit:

This day personally appeared before the undersigned notary for said state and city Richard D. Lang, who, being by me first duly sworn, upon his oath says, that he is the 3rd Vice-President of the United States Fidelity & Guaranty Company; that he has read the foregoing petition and knows the contents thereof; and that the matters therein contained, so far as stated upon his knowledge, are true, and so far as stated upon information, he believes the same to be true; and this affiant is duly authorized to make this affidavit.

RICHARD D. LANG,
3rd Vice-President.

Sworn to and subscribed before me this 3d day of February, 1906. Witness my hand and official seal.

[NOTARIAL SEAL.] A. D. PATRICK,
Notary Public.

60 EXHIBIT O WITH BILL.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

To the Honorable George W. Johnson, Referee:

Your petitioners, M. J. Bray, C. D. Dotson and Alfred Heine, respectfully represent unto your Honor that in pursuance of an order entered herein on the 12th day of February, 1906, they file this petition as trustees of the estate of this bankrupt.

And thereupon, these petitioners say that heretofore, to-wit, on the 19th day of November, 1904, a decree was entered by your Honor, whereby certain named creditors of the aforesaid bankrupt, holding debts against this estate, were adjudged and decreed to have a preference or priority over the general creditors of this estate to the extent of the amounts of their respective claims.

The following is a list of the creditors above referred to, and the amount of their respective debts, which were by the decree aforesaid, determined to have said preference:

D. A. Rardin, Athens, O.	$327.00
Duncan & Porter Co., Allegheny, Pa.	460.00
Riter-Conley Co., Pittsburg, Pa.	4,858.00
The Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59
The Monongahela River Coal & Coke Co., Pittsburg, Pa.	4,582.98
Pittsburg *Valley* Pole Co., Pittsburg, Pa.	634.20
The Nicola Bros. Co., Pittsburg, Pa.	1,199.77
C. D. Dotson, Parkersburg, W. Va.	2,084.08
C. C. Martin & Co., Parkersburg, W. Va.	372.15
The Variety Iron Works, Cleveland, O.	7,348.00
E. L. Oles.	148.20
Southern Lime & Cement Co.	2,806.00
Clydesdale Stone Co., Pittsburg, Pa.	6,185.35
Withers & Vandevender, Parkersburg, W. Va.	3,000.00
E. L. Neal, Ben Lomond, W. Va.	1,045.50
61 Lombard Iron Works, Augusta, Ga.	2,107.82

Your petitioners further show that on the 26th day of January, 1906, one John G. Eigenmann, filed his petition herein, in which he alleged that for certain reasons therein set forth, the aforementioned decree of the 19th of November, 1904, should be re-heard, and that the several claims which were by that decree given a preference and priority over the general creditors of said bankrupt, should be re-opened and re-examined, and that this court should again inquire into the facts as to their alleged preferential rights.

And said Eigenmann in his petition aforesaid, prayed that this court would require these trustees to file herein such pleadings as were necessary in order to have a rehearing of the decree complained of.

These petitioners on the 12th day of February, 1906, filed their answer herein to the petition of said Eigenmann, in which they expressed their perfect willingness to abide the order of this court upon the questions presented in the petition of said Eigenmann, and stated that if, in the opinion of this court, it was proper for these petitioners to file the pleading asked for by said Eigenmann, they were ready and willing to do so; and thereupon, on the said 12th day of February, 1906, this court having duly considered the petition of said Eigenmann and the answer of these Trustees thereto, and the argument of counsel, entered a decree directing these petitioners to file herein pleadings necessary to have said decree of the 19th of November, 1904, reviewed and re-heard; and it is in obedience to this last mentioned order of this honorable court that these Trustees now ask leave to file this their petition.

Your petitioners further alleged that since the entry of the decree of the 12th of February, 1906, their counsel applied to C. D. Merrick, Esquire, the attorney for said John G. Eigenmann, and requested that he furnish the counsel for these Trustees with a concise statement of the several grounds upon which said Eigenmann claims that the decree of November 19, 1904, should be re-heard; and in response to this request the said Merrick has furnished these Trustees with the grounds aforesaid, which are in the words and figures following, to-wit:

"To M. J. Bray, C. D. Dotson and Alfred Heine, Trustees in Bankruptcy of Evansville Contract Company:

Take Notice, that, whereas, on February 12, 1906, upon the application of the undersigned an order was entered by George W. Johnson, Referee, before whom said bankruptcy case of the Evansville Contract Company is pending, directing you to file a peti-
62 tion asking for the re-examination of the claims allowed as preferred claims in said proceeding, by order entered on the 19th day of November, 1904, and as I understand you are about to file such petition, I desire to call your attention to the grounds on which I believe said claims should be objected to, and which I claim should be the basis of the said petition to be filed by you, to-wit:

First. It is claimed by me that said claims are not properly proven.

Second. That said claims should not be allowed, or any portion thereof, until the *said* are properly proven.

Third. It is claimed by me that the said claims set forth as preferred claims in said order of November 19, 1904, are not preferred claims as to the property of said Evansville Contract Company, or any part thereof, and are not preferred claims as to the public works constructed by the said Evansville Contract Company referred to in said proceedings, and are not liens upon such public works, of the proceeds received or to be received for the construction of such works, and are not preferred or prior claims or liens upon any of the funds

or proceeds arising in said bankruptcy proceedings in any manner or from any source.

Fourth. It is claimed by me that the said claims should be re-examined and reconsidered, because the evidence upon which said adjudication of November 19, 1904, of preferences, was not based on sufficient evidence, either in law or in fact, and that the said evidence which was taken in support of said claims as preferred claims, does not show that said claims, or any of them, or any part thereof, are preferred claims as to any assets to be administered in said case.

JOHN G. EIGENMANN,
By C. D. MERRICK, *His Attorney.*"

Your petitioners now allege that without vouching for the correctness, either in fact or in law, of the several grounds set forth in the foregoing paper delivered to them by the attorney for the said Eigenmann, they, nevertheless, hereby petition and request this court to inquire into the several grounds so set forth, and to that end they hereby respectfully request and petition this court to re-open, re-examine, re-hear, and review the said decree of the 19 of November, 1904, so far as that decree gives or attempts to give the several
63 creditors whose names have heretofore been mentioned any preference or priority over the general creditors of this bankrupt.

Your petitioners are informed that it is contended by said Eigenmann (if they correctly understand his position) that there is in reality no preference at all which can be accorded any of the creditors mentioned in the decree of the 19th of November, 1904.

Petitioners are informed that it is contended by said Eigenmann, the rights which those several creditors may have is not a preference over other creditors, so far as the disposition of the funds in the hands of these Trustees is concerned; but that they may have a right, under the Act of Congress, to sue upon the bond which was given by the Evansville Contract Company and the United States Fidelity & Guaranty Company for any portion of their respective debts, which would not be paid them upon a pro rata distribution of the funds in the hands of these trustees.

Therefore, as petitioners are informed, it is contended by said Eigenmann that the so-called preferred creditors have no lien, either upon the structures erected by this bankrupt for the United States Government, nor upon the funds which come into the hands of these Trustees belonging to the estate of this bankrupt; but that their only rights are, first, to participate with all creditors of said bankrupt in a pro rata distribution of said funds, and secondly, to sue upon the bond above mentioned, and to recover thereon against the United States Fidelity & Guaranty Company, whatever portion of their debts may not have been paid them, under such pro rata distribution.

Your petitioners allege that this view of the matter was not presented to this Honorable Court at the time of the entry of the decree of the 19th of November, 1904. Therefore, your petitioners urge

this in connection with the reasons assigned in the paper of C. D. Merrick, attorney for Eigenmann, as the several reasons why they now ask this court to re-open, re-examine and re-hear the matters and things hereinbefore mentioned; and in order that the issue may be properly made up and that the parties to be affected by such re-hearing may be properly before the court for that purpose, your petitioners pray that D. A. Bardin; Duncan & Porter Company; Riter-Conley Company; The Parkersburg Mill Company; The Monongahela River Consolidated Coal & Coke Company; The Pittsburg *Valley* Pole Company; The Nicola Brothers Company; C. D. Dotson; C. C. Martin & Company; The Variety Iron Works; E. L. Oles; *Southern* Lime & Cement Company; Clydesdale Stone Company, Withers & Vandervender; A. L. Neal and Lombard Iron Works; all of whom have heretofore made themselves parties to this
64 proceeding, may be required to appear before this court in answer to this petition, so far as it relates to their several and respective claims; and that said claims may be re-examined and re-considered, as to the amount and justice of said claims; and as to their alleged rights of preference or priority against the assets and funds and property of this estate, or any portion thereof.

And further, may this court inquire into the further question as to what portion of the funds of this estate any of said claimants may have such preference, provided, of course, the court is of the opinion that they have any preference at all.

And to this end may this Honorable Court review, re-hear, and re-open the decree of the 19th of November, 1904, and as in duty bound, your petitioners will ever pray, &c.

(Signed) M. J. BRAY.
C. D. DOTSON.

Endorsed: "Petition of Trustees, asking for re-opening and re-consideration of decree of November 19, 1904. Filed 3, 1, '06, 11 A. M. Geo. W. Johnson, referee in bankruptcy.

A copy.
Teste:
T. A. BROWN, *Referee.*

Fee for copying, $3.50. Paid by B. M. Ambler.

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

At Parkersburg, in Said District, this 12th Day of February, 1906.

This day came the Trustees, by their attorney, J. A. Dupuy, and by leave of court filed their answer herein to the petition of

John G. Eigenman, in answer to the said petition and the rule awarded against them to show cause.

Thereupon appeared C. D. Merrick, attorney representing John G. Eigenman, and J. A. Dupuy, representing the Trustees,
65 and the said petition of John G. Eigenman and the answer filed thereto by the Trustees were argued by counsel, as well as the matters arising thereon, and the same were submitted to the court for its decision.

And it appearing to the court that the Trustees herein are willing that there be a re-examination of the claims heretofore established as preferred claims herein, and the court being of opinion that the same should be considered—

On consideration whereof, it is ordered that the Trustees herein be instructed to file the necessary pleadings herein, to raise the question as to whether, or not, the claims heretofore allowed as preferred claims are properly preferred claims, and for the re-examination and consideration thereof.

And it is further ordered by the court that the said Trustees do file such pleadings, as hereinbefore indicated, on or before the 19th day of February, 1906.

(Signed) GEO. W. JOHNSON.
Referee in Bankruptcy.

A copy.
Teste:
T. A. BROWN, *Referee.*

Fee for copying, $1.00 Paid by B. M. Ambler.

EXHIBIT P WITH BILL.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

At Parkersburg, in said District, this 11th Day of September, 1906.

This being the day fixed by the court for a meeting of all the creditors of said bankrupt to take up and consider matters that may legally and properly come before said meeting.

Present at said meeting, B. M. Ambler, attorney for The United States Fidelity & Guaranty Company and sundry other creditors of record, V. B. Archer, attorney for the Farmers & Mechanics National Bank at Parkersburg, West Virginia, M. J. Bray, Trustee, in person, and by his attorney, J. A. Dupuy, J. A. Dupuy,
66 attorney for the Trustee and for himself, and P. W. Frey and J. Eichel representing sundry creditors of record, and C. D. Merrick, attorney for John G. Eigenmann.

Thereupon appeared C. D. Merrick, attorney as aforesaid, and moved leave of the court to permit John G. Eigenmann, the petitioner herein, who filed a petition in reference to compelling the Trustees or Trustee to contest the so-called preferred claims herein, to withdraw from any further proceedings herein, and to be relieved from any further participation in the proceedings now pending before the Referee in the above bankruptcy, thereupon the other parties present joined in said motion, and the same was argued by counsel and submitted to the court for its decision.

On consideration whereof it is ordered that the said John G. Eigenmann do now withdraw and be permitted to withdraw from any further proceedings herein in reference to said petition or otherwise.

(Signed) GEO. W. JOHNSON,
Referee in Bankruptcy.

A copy.

Teste:

T. A. BROWN, *Referee.*

Fee for copying, $1.00. Paid by B. M. Ambler.

EXHIBIT Q WITH BILL.

(This exhibit is not now found among the papers in said cause.—Clerk.)

EXHIBIT R WITH BILL.

(Filed September 21, 1907.)

EVANSVILLE, IND., *January* 31, 1905.

Hon. George W. Johnson, Parkersburg, W. Va.

MY DEAR JUDGE: I enclose herewith formal notification that I hold assignment of claims of the First National Bank of Rockport, Ind.; The Farmers Bank of Rockport, Ind.; The Cannelton State Bank of Cannelton, Ind.; and George Biedenkopf, all against the Evansville Contract Co. I send you this notification so
67 that you may not be required to send them notices in the future. I will put the assignments themselves on file whenever you desire them.

With kind personal regards, I am,

Yours very truly,

(Signed) PHILIP W. FREY.

Dic. to A.

A copy—Teste:

T. A. BROWN, *Referee.*

Fees for copying 50c. Paid by B. M. Ambler.

EXHIBIT S WITH BILL.

(Filed September 21, 1907.)

EVANSVILLE, IND., *January* 31, 1905.

Hon. George W. Johnson, Referee in Bankruptcy, Parkersburg, W. Va.

SIR: I beg herewith to notify you that I am the owner, by assignment, of the following claims against the Evansville Contract Co., to-wit: The Cannelton State Bank of Cannelton, Ind., vs. The Evansville Contract Co.; The Farmers Bank of Rockport, Ind. vs. The Evansville Contract Co.; The First National Bank of Rockport, Ind. vs. The Evansville Contract Co.; John Biedenkopf vs. Evansville Contract Co.

And that all the right, title and interest of said claimants has been assigned to me.

Respectfully yours,
(Signed) PHILIP W. FREY.

Dic. to A.

A copy—Teste:
T. A. BROWN, *Referee*.

Fee for copying 50c. Paid by B. M. Ambler.

68 EXHIBIT T WITH BILL.

(Filed September 21, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

Power of Attorney.

The undersigned, who are creditors of the above named bankrupt, whose claims have been proven in the above named cause, whether in their own names, or in the names of parties from whom said claims have been assigned, do hereby constitute and appoint C. D. Dotson, of the City of Parkersburg, West Virginia, their true and lawful attorney in fact and proxy, to vote in their names, at any meeting of the creditors of said bankrupt which may hereafter be called to consider the question of the sale of certain property still owned by the estate of said bankrupt; that is to say, certain claims of the bankrupt against the United States Government, now pending in the Court of Claims at Washington, D. C., and a certain other claim against The Monongahela River C. C. & C. Co., pending in the Court at Pittsburg, Pa.

At such meeting of said creditors, the said C. D. Dotson is fully authorized and empowered to vote for us upon all questions presented for the consideration and action of the creditors and the

action of said Dotson shall be as binding upon the undersigned as if the undersigned were present in person.

Witness the following signatures this 1 day of December, 1906:

JACOB EICHEL.
JACOB EICHEL, *Assignee of Helena Myers Claim.*
JACOB EICHEL, " " *C. D. Gilchrist Claim.*
JACOB EICHEL, " " *P. W. Frey* "
JACOB EICHEL, " " *Alexander Gilchrist Claim.*
JACOB EICHEL, " " *R. J. Armstrong* "
JACOB EICHEL, " " *Citizens Nat'l Bank* "
JACOB EICHEL, " " *First National Bank Claim.*
JACOB EICHEL, " " *Old National Bank* "
JACOB EICHEL, " " *Second National Bank* "
69 JACOB EICHEL, *Assignee of Farmers & Mechanics N. Bank Claims.*
JACOB EICHEL, " " *Parkersburg Dock Company Claims.*
JACOB EICHEL, " " *Evansville Journal Company Claims.*
JACOB EICHEL, " " *Phil W. Frey.*
JACOB EICHEL, " " *Peoples Savings Bank.*
JACOB EICHEL, " " *Evansville Journal Co.*
JACOB EICHEL " " *Meyer Newberger & Co.*
JACOB EICHEL, " " *Parkersburg Dock Co.*
WILLIAM EICHEL.
CHARLES J. EICHEL *Jacob Eichel.*
LAURA EICHEL, *Assignee of Cannelton State Bank, Cannelton, Ind.*
LAURA EICHEL, " " *Farmers Bank of Rockport, Indiana.*
LAURA EICHEL, " " *First National Bank of Rockport, Ind.*
LAURA EICHEL, " " *Variety Iron Works Co. of Cleveland, O.*
LAURA EICHEL, " " *E. L. Neal.*
LAURA EICHEL, " " *L. Kramer & Son.*
LAURA EICHEL, " " *Lombard Iron Works & Supply Co.*
LAURA EICHEL, " " *Monongahela River C. C. & Co.*
LAURA EICHEL, " " *Withers & Vandevender.*
LAURA EICHEL, " " *Duncan Porter Co.*
LAURA EICHEL, " " *E. L. Oles.*
LAURA EICHEL, " " *Southeastern Lime & Cement Co.*
LAURA EICHEL, " " *Parkersburg Mill Co.*
LAURA EICHEL, " " *C. D. Dotson.*
LAURA EICHEL, " " *C. C. Martin & Co.*
JACOB EICHEL, " " *Pittsburg Trolley Pole Co.*
JACOB EICHEL, " " *Nicola Bros. Co.*
LAURA EICHEL.

A copy—Teste:
T. A. BROWN, *Referee.*

Fee for copying 4 pages $2.00. Paid by B. M. Ambler.

70 THE STATE OF TEXAS,
County of El Paso:

Before me, T. C. Lea, Jr., a notary public, on this day personally appeared Jacob Eichel, known to me to be the person, whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed; and also came Laura Eichel, known to me to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, said Laura Eichel acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this 1 day of Dec. A. D. 1906.

(Signed) T. C. LEA, JR.,
Notary Public, El Paso Co., Tex.

EXHIBIT U WITH BILL.

(Filed November 19, 1907.)

In the District Court of the United States for the District of Indiana. In Bankruptcy.

No. 223.

In Bankruptcy.

In the Matter of JACOB EICHEL, by Whom a Petition for Adjudication of Bankruptcy was Filed on the 7th Day of September, A. D. 1904.

Whereas, On the 7th day of September, A. D., 1904, a petition was filed to have Jacob Eichel, of Evansville, in the county of Vanderburg, and District of Indiana, adjudged a bankrupt according to the provisions of the Act of Congress relating to bankruptcy; And whereas: The Judge of said Court was absent from said District at the time of filing said petition.

It is therefore ordered that the said matter be referred to Hon. O. W. McGinnis, one of the referees in bankruptcy of this court to consider said petitioner, and take such proceedings therein as are required by said acts; and that the said Jacob Eichel, shall attend before said referee on the 9th day of September, A. D., 1904, at 9 o'clock A. M.

71 And afterwards, to-wit, on the 9th day of September, A. D., 1904, the following further proceedings in said matter were had, to-wit:

At Evansville, in said District on the 9th day of September, A. D., 1904, before Orville W. McGinnis, referee in bankruptcy for the First Referee District of said court, the following further proceeding- were had, to-wit:

Come to hand this day and an order of reference issued by the Clerk of said Court, dated the 7th day of September, A. D., 1904, referring the petition of the above named Jacob Eichel, of Evansville, in the county of Vanderburg, and District aforesaid, that he be adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy to me, to consider the same and take such proceedings therein as are required by said Acts, said order of reference reciting that the Judge of said Court was absent from said district at the time of the filing of the above named petition, to-wit: on the 7th day of September, A. D., 1904, and said order of reference being accompanied by the said petition and the schedules of said bankrupt.

Whereas; Said order of reference requires said bankrupt to appear before me this day, it is now therefore ordered that the attorney for said bankrupt, namely, Philip W. Frey, Esq., be advised that said bankrupt *to* appear as aforesaid.

Comes now said bankrupt Jacob Eichel in person and by his counsel, Philip W. Frey, Esq.

And now here the first meeting of the creditors under said bankruptcy is ordered for the 27th day of September, A. D., 1904, and said bankrupt ordered to attend the same in person.

(Signed) ORVILLE W. McGINNIS,
Referee in Bankruptcy."

And afterwards, to-wit, on the 17th day of February, A. D., 1905, a discharge was issued to bankrupt in the words and figures following, to-wit:

Discharge of Bankrupt.

District Court of the United States, District of Indiana.

Whereas Jacob Eichel of Evansville in said District, has been duly adjudged a bankrupt under the Acts of Congress relating to bankruptcy and appears to have conformed to all requirements of law in that behalf, it is therefore ordered by this court

72 that said Jacob Eichel be discharged from all debts and demands which are made provable by said acts against his estate, and which existed on the 7th day of September, A. D., 1904, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable Albert B. Anderson, Judge of said District Court, and the seal thereof, this 17th day of February, A. D., 1905.

NOBLE C. BUTLER, *Clerk.*

UNITED STATES OF AMERICA,
District of Indiana, ss:

I hereby certify that the above and foregoing is a full, true and complete record of the proceedings and transcript thereof of the proceedings had in the matter of Jacob Eichel, bankrupt, relating to his adjudication and discharge, as fully as the same appears of record on file in my office at Evansville.

Witness my hand and the seal of said court this 25th day of September, A. D., 1907.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

EXHIBIT V WITH BILL.

(Filed September 21, 1907.)

This agreement made this 3rd day of November, 1906, between The First National Bank, The Citizens National Bank, and Madison J. Bray, of Evansville, Indiana, parties of the first part, and Jacob Eichel, of said city, party of the second part.

Witnesseth:

The parties of the first part hereby agree to sell, transfer and assign to the party of the second part the respective judgments rendered in favor of each against John G. Eigenmann and The Evansville Contract Company, in the Gibson Circuit Court, on the 20th day of August, 1906, and also the judgment rendered in their favor jointly against Louis P. Eigenmann, together with *a* all of their right, title and interest, in and to the judgment and decree of said court in a cause therein pending wherein the parties of the first part were plaintiffs, and the Evansville Contract Company, John G. Eigenmann, and others, were defendants, in consideration of the sum of fourteen thousand dollars (14,000) cash to be paid by the party of the second part at the date of the execution of this
73 assignment, and to be divided among the parties of the first part pro rata, according to the amounts of their respective several judgments.

The parties of the first part also agree that they will assign to the party of the second part their several claims filed against said Evansville Contract Company, now in bankruptcy, and to execute all such proper transfers and assignments of such judgments and said claims as shall be necessary to vest title thereto in the party of the second part.

The parties of the first part also agree to transfer and assign to the party of the second part their several judgments rendered in the Superior Court of Vanderburgh county against William Eichel on the same notes on which the judgment against said John G. Eigenmann and The Evansville Contract Company were rendered, in consideration of the execution by the party of the second part to each of the parties of the first part of his note at one year, with six per cent. (6%) interest, for ten per cent. (10%) of the principal of their respective claims.

In further consideration whereof the party of the second part agrees that he will protect, indemnify, and save harmless the parties of the first part and each of them against all loss, damages and liability of every kind that they or either of them have assumed or shall hereafter incur by reason of the execution of a bond to The United States Fidelity and Guaranty Company in the sum of seventy-five thousand dollars ($75,000.00) bearing date April 4, 1904. Said Eichel is to pay and protect parties of the first part against liability for costs accrued and to accrue in any of said proceedings.

In witness whereof the said banks have caused these presents to be executed in their respective names by their respective presidents, and the other parties hereto have hereunto set their hands and seals this the day and year first above written.

THE FIRST NATIONAL BANK OF
EVANSVILLE, INDIANA.
By FRANCIS J. REITZ, *President.*
THE CITIZENS NATIONAL BANK OF
EVANSVILLE, INDIANA.
By S. P. GILLETT, *President.*
MADISON J. BRAY.
J. EICHEL.

A True Copy:

74 EXHIBIT W WITH BILL.

(Filed September 21, 1907.)

In consideration of the payment of one dollar ($1) receipt of which is hereby acknowledged, and in further consideration of the fact that the First National Bank of Evansville, Indiana, did assign, sell (without recourse), transfer and set over unto Jake Eichel all its right, interest, claim and demand in and to certain notes against the Evansville Contract Company as referred to in an article of agreement (a copy of which is hereto attached).

I, the undersigned, hereby agree that I will protect, indemnify and save harmless the said First National Bank of Evansville, Indiana, against all loss, damages, and liability of any kind that they have assumed or shall hereafter incur by reason of the execution of a bond to the United States Fidelity and Guaranty Company in the sum of seventy-five thousand dollars ($75,000) bearing date of April 4, 1904 Witness my hand and seal.

M. J. BRAY.

Witness:
F. A. FOSTER

A True Copy:

_____,
Notary Public.

Decree Permitting Suit to be Brought.

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

This day the United States Fidelity & Guaranty Company presented its petition, accompanied by a bill in equity wherein the said Company is complainant, and M. J. Bray and others, are defendants, and moved the Court to be allowed to file such bill in the
75 Circuit Court of the United States, against the said M. J. Bray and other persons named, and the said petition is ordered to be filed at Parkersburg. Upon consideration whereof it is ordered, adjudged and decreed that leave and permission be and are granted unto the United States Fidelity & Guaranty Company to file such bill in the Circuit Court of the United States for this district, and that the same shall not be deemed to be in contempt or derogation of the powers and jurisdiction of this Court, but rather as ancillary thereto.

It is further ordered that a rule be issued directed to the said M. J. Bray, Trustee, and P. W. Frey, attorney at law, requiring them and each of them to show cause before this Court, at Wheeling on the 19th of November, 1907, why they and each of them should not be required and compelled to refund the money heretofore allowed to them as compensation for services performed for the estate and creditors of the said bankrupt, and that the said M. J. Bray, Trustee, shall show cause at the same time and place why he should not be discharged from his place and position as trustee on account of the charges preferred against him in said petition and in the documents to which it refers.

If for any reason either the said M. J. Bray or the said P. W. Frey are not found within said district then due services may be made upon them and each of them at their respective residences in the district of Indiana, by the marshal of said district, and he shall make return thereof to our said Court at Parkersburg.

I, C. B. Kefauver, Clerk of the District Court of the United States for the Northern District of West Virginia, do certify that the foregoing is a true copy of an order entered by said Court on the 21st day of September, 1907, at Wheeling, W. Va., in the matter in Bankruptcy in said Court pending of Evansville Contract Co., Bankrupt.

In testimony whereof I have hereunto set my hand and the seal of said Court at Wheeling in said District this 21st day of September, 1907.

[SEAL.]

C. B. KEFAUVER,
Clerk D. C. U. S., N. D. W. Va.

76 *Decree Filing Bill and Awarding Restraining Order.*

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB EICHEL and LAURA EICHEL; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

This day the Complainant, by counsel, presented to the court its bill duly verified and accompanied by exhibits, and moved the court to grant an injunction as praved for therein, and the same are ordered to be filed, at Parkersburg; and it appears that the District Court has given leave that said bill be filed.

Upon consideration whereof, it is ordered that a temporary restraining order be issued enjoining, until further order, the said M. J. Bray, trustee, the said Jacob Eichel and Laura Eichel, their attorneys, agents, and servants, from prosecuting any suit or action against the United States Fidelity & Guaranty Company upon any claims mentioned in the bill, upon which suits have been brought in the Court of Common Pleas of Allegheny County, Pennsylvania, or in the Circuit Court of the United States for the Western District of Pennsylvania; and from instituting any suit or action upon any of such claims, whether suits have heretofore been brought thereon, or not; the claims referred to being the same mentioned in the bill as having been entitled to a first lien upon the funds in the hands of the trustees of the bankrupt, by an order made on the 19th day of November, 1904, and being the same mentioned in an alleged instrument signed by P. W. Frey, dated December 12, 1904, ad-
77 dressed to the said M. J. Bray, trustee, and also being the same mentioned in an alleged contract or agreement between M. J. Bray, trustee, and Laura Eichel, which recites as its date, a note dated December 31, 1906, and purports to assign a number of claims against the bankrupt's estate from the said Laura Eichel unto the said M. J. Bray, aggregating on their face $35,663.82, at a cost of $27,037.39 of money alleged to have been furnished by the said M. J. Bray, trustee, which said paper covenants that all profits realized on such claims shall be divided equally between said Bray and Eichel.

The court does not at this time require any security from the plaintiff on the granting of such injunction, and this restraining

order shall take effect temporarily, and until further order, without bond, without prejudice to the right of any party to demand such security.

The court designates and appoints the 19th day of November, 1907, as the time, and the Court Room of this Court at Wheeling, as the place, for hearing the motion for an injunction; and it appearing to the court that this suit is, among other matters, to enforce a lien upon and a claim to a fund exceeding twenty-seven thousand dollars in the hands of the said M. J. Bray, trustee in bankruptcy of the Evansville Contract Company, and that the said company was adjudged bankrupt, and the said Bray was appointed trustee in said District; that the sum of thirteen thousand dollars each is in the hands of the Second National Bank of Parkersburg and in the Farmers & Mechanics National Bank of Parkersburg, in said District, both of which banks are within the jurisdiction of said court,—it is now, on motion of the complainant, ordered, that all of the defendants who are not within said Northern District of West Virginia, do appear, plead, answer, or demur, to said bill on or before the 1st day of November, 1907, at Parkersburg, W. Va.; and that this order be served on each of said absent defendants wherever found, and also upon the said Second National Bank and the said Farmers & Mechanics National Bank of Parkersburg, being the persons in possession or charge of said money.

It is further ordered that the marshals of the several Districts of the United States in which any of the defendants named may reside or be found, be and are hereby authorized to make service of process on each defendant within his District, and he shall make a return of such service to our said court at Parkersburg, West Virginia.

It is further ordered that if such service be found impracticable for any cause, then publication shall be made in the Parkersburg Dispatch-News, a newspaper published at Parkersburg, once a week for six consecutive weeks, as prescribed in section 8 of the
78 Act of Congress of March 3, 1875, relating to Circuit Courts.

Subpœna in Chancery.

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

The President of the United States of America to the Marshal of the Northern District of West Virginia, Greeting:

You are hereby commanded to summon M. J. Bray, Trustee of the Evansville Contract Company, bankrupt, and Jacob Eichel, and Laura Eichel, each and all of whom are citizens of and residents in the State of Indiana, in the City of Evansville, therein, the City National Bank of Evansville, Indiana, The First National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, and the First National Bank of Rockport, Indiana, each and all of said banks being corporations created and existing under the

laws of the United States relating to Banking Associations, and each being engaged in business, and having their place of business located in the respective town and cities in the State of Indiana, mentioned in their respective titles, being citizens of and residents in the State of Indiana; The Second National Bank of Parkersburg, West Virginia, and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, the two defendants last named being corporations under the laws of the United States, relating to Banking Associations, and located in the said City of Parkersburg, West Virginia, and in said District; and the Farmers Bank of Rockport, Indiana, a corporation under the laws of Indiana, and as such a citizen of and resident in the State of Indiana, and the Riter-Conley Company, a corporation under the laws of the State of Pennsylvania, doing business in the City of Pittsburg, and as such, a citizen of and resident in the State of Pennsylvania, and the Nicolette Lumber Company, a corporation under the laws of the State of West Virginia, located and doing business in the County of Wood, in the said State of West Virginia, in said District, and as such a citizen of and resident in said State and District, if they be found in your District, to be and appear in the Circuit Court of the United States for the Northern District of West Virginia, aforesaid, at Rules to be held in the Clerk's office of said Court, at Parkersburg, on the first Monday in November, next, to answer to a certain bill in chancery, now filed and exhibited in said court against them by The United States
79 Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, having its office and principal place of business in the City of Baltimore, in the State of Maryland, and as such a citizen of and a resident in the said State of Maryland. Hereof you are not to fail under the penalty of the law thence ensuing. And have then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23d day of September, A. D., 1907, and in the 132d year of the Independence of the United States of America.

Attest:

[SEAL.] S. R. HARRISON, *Clerk*.

Memorandum.

The said defendants are required to enter their appearance in this suit in the Clerk's office of said Court on or before the first Monday of November, 1907, otherwise the said bill may be taken *pro confesso*.

S. R. HARRISON, *Clerk*.

(Returned endorsed.)

Received this writ at Parkersburg, W. Va., at 10 o'clock A. M., September 24th, 1907. Executed the same at Parkersburg, upon Riter-Conley Company, by delivering a duly certified copy thereof to Reese Blizzard, attorney of record for the said Riter-Conley Company, and a resident of Parkersburg, Wood County, W. Va., at time of said service. Executed also upon The Second National Bank of

Parkersburg, Sept. 25th, 1907, at 10 o'clock A. M., by delivering a duly certified copy thereof to G. H. Carver, Cashier of said bank and a resident of Parkersburg, Wood County, W. Va., at time of said service, the President, or other chief officer of said bank not found. Executed also upon the Farmers and Mechanics National Bank of Parkersburg, Sept. 25th, 1907, at 10 o'clock A. M., by delivering a duly certified copy thereof to C. T. Hiteshue, Cashier of said Bank, and a resident of Parkersburg, W. Va., at time of said service, the President, or other chief officer not found. Executed also upon the Nicolette Lumber Company, Sept. 25th, 1907, at 3 o'clock P. M., at Parkersburg, W. Va., by delivering a duly certified copy thereof to C. W. R. Jadaker, the President of the said Nicolette Lumber Company, and a resident of Wood County, W. Va., at time of said service.

C. D. ELLIOTT,
U. S. Marshal, N. D. W. Va.,
Per A. T. BARRETT, *Office Deputy.*

80 (A like subpœna directed to the Marshal of the District of Indiana was returned with the following return endorsed thereon:)

Received this writ at Evansville, Vanderburg County, Indiana, on Sept. 29, 1907, and on Oct. 1st, 1907, at Rockport, Indiana, served the same on the First National Bank, by serving E. M. Payne, President in person, at the same time and place I served the Farmers Bank by serving Charles Lieb, President in person, leaving copies of this writ with each. I served M. J. Bray, Trustee, of Evansville Contract Co., and Laura Eichel, personally Oct. 1st, at Evansville, Ind., I served Jacob Eichel at same time and place by copy left at his last and usual place of residence with his wife Laura Eichel. I served Francis J. Reitz, President of both First National & City National Bank personally Oct. 1st at Evansville, Indiana. I served S. P. Gillett, President of the Citizens National Bank personally at Evansville, Indiana, Oct. 1st, at the same time I delivered copies of this writ to each person served.

H. C. PETTIT, Esq.,
U. S. Marshal.
CHAS. H. JOHANN, *Deputy.*

Serve- 8 papers 16.00.

Injunction.

In the Circuit Court of the United States for the Northern District of West Virginia.

UNITED STATES FIDELITY & GUARANTY COMPANY

vs.

M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel, The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

This day the complainant by counsel presented to the court its bill duly verified and accompanied by exhibits, and moved
81 the court to grant an injunction as prayed for therein, and the same are ordered to be filed at Parkersburg; and it appears that the District Court has given leave that said bill be filed.

Upon consideration whereof, it is ordered that a temporary restraining order be issued enjoining until future order the said M. J. Bray, trustee, the said Jacob Eichel and Laura Eichel, their attorneys, agents and servants, from prosecuting any suit or action against the United States Fidelity & Guaranty Company upon any claims mentioned in the bill, upon which suits have been brought in the Court of Common Pleas of Allegheny County, Pennsylvania, or in the Circuit Court of the United States for the Western District of Pennsylvania; and from instituting any suit or action upon any of such claims, whether suits have heretofore been brought thereon, or not; the claims referred to being the same mentioned in the bill as having been entitled to a first lien upon the funds in the hands of the trustees of the bankrupt, by an order made on the 19th day of November, 1904, and being the same mentioned in an alleged instrument signed by P. W. Frey, dated December 12, 1904, addressed to the said M. J. Bray, trustee, and also being the same mentioned in an alleged contract or agreement between M. J. Bray, trustee, and Laura Eichel, which recites as its date, a note dated December 31, 1906, and purports to assign a number of claims against the bankrupt's estate from the said Laura Eichel unto the said M. J. Bray, aggregating on their face $35,663.82, at a cost of $27,037.39 of money alleged to have been furnished by the said M. J. Bray, trustee, which said paper covenants that all profits realized on such claims shall be divided equally between said Bray and Eichel.

The court does not at this time require any security from the plaintiff on the granting of such injunction, and this restraining order shall take effect temporarily and until further order without bond, without prejudice to the right of any party to demand such security.

The court designates and appoints the 19th day of November, 1907, as the time, and the Court Room of this Court at Wheeling, as the place, for hearing the motion for an injunction; and it appearing to the court that this suit is, among other matters, to enforce a lien upon and a claim to a fund exceeding twenty-seven thousand dollars in the hands of the said M. J. Bray, trustee in bankruptcy of the Evansville Contract Company, and that the said company was adjudged bankrupt, and the said Bray was appointed trustee in said District; that the sum of thirteen thousand dollars each is in the hands of the Second National Bank of Parkers-
82 burg and in the Farmers & Mechanics National Bank of Parkersburg, in said District, both of which banks are within the jurisdiction of said court—it is now, on motion of the complainant, ordered that all of the defendants who are not within said Northern District of West Virginia, do appear, plead, answer, or demur to said bill on or before the 1st day of November, 1907; at Parkersburg, W. Va., and that this order be served on each of said absent defendants wherever found, and also upon the said Second National Bank and the said Farmers & Mechanics National Bank of Parkersburg, being the persons in possession or charge of said money.

It is further ordered that the marshals of the several Districts of the United States in which any of the defendants named may reside, or be found, be and are hereby authorized to make service of process on each defendant within his District, and he shall make a return of such service to our said Court at Parkersburg, West Virginia.

It is further ordered that if such service be found impracticable for any cause, then publication shall be made in the Parkersburg Dispatch-News, a newspaper published at Parkersburg, once a week for six consecutive weeks, as prescribed in Section 8 of the Act of Congress of March 3, 1875, relating to Circuit Courts.

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, do certify that the foregoing is a true copy of an order entered of record by said court on the 21st day of September, 1907, in the cause in equity therein pending in which United States Fidelity & Guaranty Company is plaintiff and M. J. Bray, trustee of the Evansville Contract Company, and others are defendants.

In testimony whereof, I have hereto set my hand and the seal of said court this 21st day of September, 1907.

[SEAL.]

S. R. HARRISON,
Clerk C. C. U. S., N. D. W. Va.

(Return on the writ of injunction to the Marshal of the Northern District of West Virginia:)

Received this writ at Parkersburg, W. Va., September 24th, 1907, at 10 o'clock A. M. Executed the same at Parkersburg, September 24th, 1907, at 2 o'clock P. M., upon Riter-Conley Company, by

delivering a duly certified copy thereof to Reese Blizzard,
83 attorney of record for said Riter-Conley Company, in Wood County, W. Va., and upon the Second National Bank of Parkersburg, by delivering a duly certified copy of the same to G. H. Carver, Cashier, and a resident of Parkersburg, W. Va., at time of said service, the President or other chief officers not found. And upon the Farmers and Mechanics National Bank of Parkersburg, by delivering a duly certified copy thereof at 10 o'clock A. M. to C. T. Hiteshue, Cashier of said Bank, the President or other chief officer not found, the said C. T. Hiteshue, being a resident of Parkersburg, W. Va., at time of said service. Executed this writ also upon Nicolette Lumber Company at Parkersburg, on the 25th day of Sept., 1907, at 3 o'clock P. M., by delivering a duly certified copy thereof to C. W. R. Radaker, the President of said Nicolette Lumber Company, and a resident of Wood County, W. Va., at time of service.

C. D. ELLIOTT,
U. S. Marshal, N. District W. Va.
Per A. T. BARRETT, *Office Deputy.*

Marshal's fees, $16.00.

(Return on writ of injunction to the Marshal of the District of Indiana:)

Received this writ at Evansville, Vanderburg County, Indiana, on Sept. 29th, 1907, and on October 1st, 1907, at Rockport, Indiana, served the same on the First National Bank by reading the same within the presence of E. M. Payne, President of the said bank, at the same time and place. I served the same upon Chas. Lieb, President of Farmers Bank, and delivered copies unto each. I served M. J. Bray, trustee of the Evansville Contract Co., and Laura Eichel personally on October 1st at Evansville, Indiana. I served Jacob Eichel on same day by copy left at his last and usual place of residence with his wife Laura Eichel. I served the First National and City National Bank at Evansville, Ind., October, 1st by serving Francis J. Reitz, President of First National & City National Bank. I served the Citizens National Bank of Evansville, Ind., on Oct. 1st, by serving S. P. Gillett, President of said Bank, and delivered copies to each and every person served.

H. C. PETTIT, Esq.,
U. S. Marshal.
CHAS. H. JOHANN, *Deputy.*

Served 8 papers.....	16.00
Mileage	3.06
	$19.06

84 *Demurrer of The Farmers Bank of Rockport.*

(Filed October 30, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY

vs.

M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel, The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, on the 29th day of October, 1907, comes The Farmers Bank of Rockport, Indiana, by its attorney, William M. Hall, and demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because it is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

FARMERS BANK OF ROCKPORT, INDIANA.
By T. E. LYDER, *Cashier.*

85 I, William M. Hall, Attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

W. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana, County of Warrick, ss:

I, T. E. Lyder, Cashier of Farmers Bank of Rockport, Indiana, being duly sworn, says that the above demurrer is not interposed for delay.

T. E. LYDER, *Cashier.*

Sworn to and subscribed before me this 29th day of October, A. D. 1907.

[SEAL.]

S. L. TYNER,
Clerk Warrick Circuit Court.

My commission expires —.

Demurrer of First National Bank of Rockport.

(Filed October 30, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel, The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virgina; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, the 29th day of October, 1907, comes The First
86 National Bank of Rockport, Indiana, by its attorney, William M. Hall, and demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because it is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

THE FIRST NATIONAL BANK OF ROCKPORT, INDIANA,
By WM. I. RUDD, *Cashier.*

I, William M. Hall, Attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

W. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana, County of Warrick, ss:

Wm. I. Rudd, Cashier of First National Bank of Rockport, Ind., being duly sworn, says that the above demurrer is not interposed for delay.

WM. I. RUDD, *Cashier.*

Sworn to and subscribed before me this 29th day of Oct., A. D. 1907.

[SEAL.] S. L. TYNER,
Clerk Warrick Circuit Court.

My commission expires —.

87 *Appearance of Nicolette Lumber Co.*

(Filed October 31, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

To the Clerk of said Court:

Enter my appearance for the Nicolette Lumber Company, one of the defendants in the above entitled case.

W. M. HALL,
Attorney for Nicolette Lumber Company, of Third Circuit Bar.

88 *Appearance of Jacob Eichel et al.*

(Filed October 31, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY

vs.

M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

To the Clerk of said Court:

Enter my appearance for the following named defendants in the above case: Jacob Eichel, Laura Eichel, City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Farmers Bank of Rockport, Indiana, de bene esse with right to object to the jurisdiction of the court in this case, the said defendants not appearing generally.

WM. M. HALL,
Atty for Above-named Defendants.
Member of the Bar of the 3rd Circuit.

89 *Demurrer of Jacob Eichel.*

(Filed October 31, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY

vs.

M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, Oct. 31, 1907, comes Jacob Eichel, by his attorney, William M. Hall, and demurs to the bill filed in this case for the

following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because he is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

JACOB EICHEL.

90 I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

W. M. HALL.

UNITED STATES OF AMERICA,
State of Pennsylvania, County of Allegheny, ss:

Jacob Eichel, being duly sworn, says that the above demurrer is not interposed for delay.

JACOB EICHEL.

Sworn to and subscribed before me this 28th day of October, 1907.
[NOTARIAL SEAL.]
R. C. BILY,
Notary Public.

My commission expires January 16th, 1909.

Demurrer of Laura Eichel.

(Filed October 31, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, Oct. 31, 1907, comes Laura Eichel, by her attorney, William M. Hall, and demurs to the bill filed in this case
91 for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because she is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

LAURA EICHEL.

I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

W. M. HALL.

UNITED STATES OF AMERICA.
State of Indiana, County of Vanderburgh, ss:

Laura Eichel, being duly sworn, says that the above demurrer is not interposed for delay.

LAURA EICHEL.

Sworn to and subscribed before me this 29th day of October, A. D., 1907.

ADOLPH F. DECKER.
Notary Public.

[NOTARIAL SEAL.]

My commission expires August 6, 1910.

92 *Motion to Dismiss Bill.*

(Filed November 1, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, Oct. 31, 1907, come Jacob Eichel, Laura Eichel, City National Bank of Evansville, Indiana; First National Bank of

Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana, and Farmers Bank of Rockport, Indiana, and move the court to dismiss the bill in this case for the following reasons, these defendants appearing specially for this motion, and not generally:

First. The court has no jurisdiction to entertain such bill as against these defendants, because they are residents of the State of Indiana and are not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

93 Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

JACOB EICHEL.
LAURA EICHEL.
CITY NATIONAL BANK OF EVANSVILLE, INDIANA.
FIRST NATIONAL BANK OF EVANSVILLE, INDIANA.
CITIZENS NATIONAL BANK OF EVANSVILLE, INDIANA.
FIRST NATIONAL BANK OF ROCKPORT, INDIANA, AND
FARMERS BANK OF ROCKPORT, INDIANA.
By W. M. HALL, *Their Attorney.*

Demurrer of Citizens National Bank, Evansville.

(Filed November 1, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, October 31st, 1907, comes the Citizens National Bank of Evansville, Indiana, by its attorney, William M. Hall,
94 and demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

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First. The court has no jurisdiction to entertain such bill against this defendant, because it is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

THE CITIZENS NATIONAL BANK,
EVANSVILLE, IND.,
By W. L. SWORMSTEDT, *Cashier.*

I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

WM. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana, County of Vanderburgh, ss:

—— —— of Citizens National Bank of Evansville, Ind., being duly sworn, says that the above demurrer is not interposed for delay.

THE CITIZENS NATIONAL BANK,
EVANSVILLE, IND.,
By W. L. SWORMSTEDT, *Cashier.*

Sworn to and subscribed before me, this 29th day of October, A. D., 1907.

[NOTARIAL SEAL.] LOUIS F. KRAFT,
Notary Public.

My commission expires Nov. 15th, 1908.

95 *Demurrer of City National Bank, Evansville.*

(Filed November 2, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, Nov. 1, 1907, comes City National Bank of Evansville, Indiana, by its attorney, William M. Hall, and demurs to the bill

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filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because it is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

CITY NATIONAL BANK OF EVANSVILLE, INDIANA,
By F. A. FOSTER, *Cashier.*

96 I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

WM. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana, County of Vanderburgh, ss:

F. A. Foster, Cashier of the City National Bank of Evansville, Ind., being duly sworn, says that the above demurrer is not interposed for delay.

F. A. FOSTER.

Sworn to and subscribed before me, this 30th day of October, A. D., 1907.

[NOTARIAL SEAL.] BESSIE LUCK,
Notary Public.

My commission expires Nov. 14, 1909.

Demurrer of First National Bank, Evansville.

(Filed November 2, 1907.)

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY

vs.

M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907, at Chambers.

And now, Nov. 1, 1907, comes The First National Bank of Evansville, Indiana, by its attorney, William M. Hall, and
97 demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because it is a resident of the State of Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

THE FIRST NATIONAL BANK OF EVANSVILLE, INDIANA,
By F. A. FOSTER, *Cashier.*

I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

WM. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana, County of Vanderburgh, ss:

F. A. Foster, Cashier of First National Bank of Evansville, Ind., being duly sworn, says that the above demurrer is not interposed for delay.

F. A. FOSTER.

Sworn to and subscribed before me, this 30th day of October, A. D. 1907.

[NOTARIAL SEAL.] BESSIE LUCK,
Notary Public.

My commission expires Nov. 14, 1909.

98 *Demurrer of Second National Bank, Parkersburg.*

(Filed November 4, 1907.)

Circuit Court of the United States for the Northern District of West Virginia.

No. —. In Equity.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff,
vs.
M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt; The Second National Bank of Parkersburg, a Corporation; The Farmers & Mechanics National Bank of Parkersburg, a Corporation, et al., Defendants.

To the Honorable Alston G. Dayton, Judge of said Court:

The demurrer of Second National Bank of Parkersburg, West Virginia, one of the defendants above named, to the bill of complaint of the United States Fidelity & Guaranty Company, the above named plaintiff.

This defendant, by protestation, not confessing of acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged demurs thereto, and for cause of demurrer shows:

First. That the said plaintiff has not in and by the said bill made or stated any such cause as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Second. That the said plaintiff has not, as appears by its said bill, made out any title to the relief thereby prayed.

Third. That there is no jurisdiction in the United States Circuit Court for the Northern District of West Virginia, over the subject matter complained of in the plaintiff's bill to authorize a decree for the relief prayed for.

99 Fourth. That the plaintiff, if it has any claim, or demand against this defendant, has an adequate, ample and complete remedy at law.

Fifth. That it is made to appear by the allegations of the said bill of complaint that the plaintiff is seeking to enforce in equity an alleged indemnity bond, claimed to have been executed by this defendant, it manifestly appearing from said bill that this defendant is

corporation organized, created and existing under the laws of the United States enacted for the purpose of organizing and conducting National Banks—and under which laws this defendant had no authority, right or power to execute any such alleged bond or indemnity, and the same, if executed, is null and void and wholly incapable of enforcement against this defendant.

Sixth. That it appears by the said bill that the same is exhibited against this defendant and the several other persons therein named as defendants thereto, for distinct matters and causes, in several thereof as appears by the said bill, this defendant is not in any manner interested or concerned, and that this bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto and humbly demands the judgment of this court whether it should be compelled to make any other or further answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

SECOND NATIONAL BANK,
By G. H. CARVER, *Cashier.*

V. B. ARCHER,
Att'y for Def't.

Verification of Demurrer.

STATE OF WEST VIRGINIA,
Wood County, To wit:

G. H. Carver makes solemn oath and says that he is the cashier of the above named defendant, the Second National Bank of Parkersburg, West Virginia, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

G. H. CARVER.

100 Subscribed and sworn to before me this 28th day of October, 1907.

[NOTARIAL SEAL.] R. L. PERKINS,
Notary Public for Wood County, West Virginia.

Certificate of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

V. B. ARCHER,
Counsel for Defendant.

Demurrer of M. J. Bray.

(Filed November 4, 1907.)

In the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

At Rules Held in said Court on the First Monday in November, 1907.

In Equity.

UNITED STATES FIDELITY AND GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel; The City National Bank of Evansville, Indiana, and Others.

And now comes M. J. Bray, trustee of the Evansville Contract Company of Evansville, Indiana, by his attorney, J. A. Dupuy, and demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because the bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

101 Second. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill, that is to say in the District Court of the United States for the Northern District of West Virginia, & other courts.

M. J. BRAY, *Trustee.*
By J. A. DUPUY,
His Attorney.

I, J. A. Dupuy, attorney for the above named defendant, M. J. Bray, trustee, do certify that, in my opinion, the above demurrer is well founded in point of law.

J. A. DUPUY.

UNITED STATES OF AMERICA,
State of Virginia, City of Roanoke, ss:

J. A. Dupuy, whose name is hereto subscribed, this day personally appeared before me, a Notary Public, for the City of Roanoke, Virginia, in the State of Virginia, and being by me first duly sworn, says that he is the attorney for M. J. Bray, trustee, for the Evansville Contract Company, one of the defendants in the above named suit, that the above demurrer is not interposed for delay, that this affi-

davit is made by said attorney because the defendant, Bray, resides several hundred miles away in the city of Evansville, Indiana.

J. A. DUPUY.

Sworn to and subscribed before me, this the 2d day of November, A. D. 1907.

F. SPENCER ARMISTEAD,
Notary Public for Roanoke City, Virginia.

102 *Demurrer of Farmers and Mechanics National Bank.*

(Filed November 4, 1907.)

Circuit Court of the United States for the Northern District of West Virginia.

No. —. In Equity.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff,

vs.

M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt; The Second National Bank of Parkersburg, a Corporation; The Farmers & Mechanics National Bank of Parkersburg, a Corporation, et al., Defendants.

To the Honorable Alston G. Dayton, Judge of said Court:

The demurrer of Farmers & Mechanics National Bank of Parkersburg, West Virginia, one of the defendants above named, to the Bill of Complaint of the United States Fidelity & Guaranty Company, the above named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged demurs thereto, and for cause of demurrer shows:

First. That the said plaintiff has not in and by the said bill made or stated any such cause as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Second. That the said plaintiff has not, as appears by its said bill, made out any title to the relief thereby prayed.

Third. That there is no jurisdiction in the United States Circuit Court for the Northern District of West Virginia, over the subject matter complained of in the plaintiff's bill to authorize a decree for the relief prayed for.

Fourth. That the plaintiff, if it has any claim, or demand against this defendant, has an adequate, ample and complete remedy at law.

103 Fifth. That it is made to appear by the allegations of the said bill of complaint that the plaintiff is seeking to enforce

in equity an alleged indemnity bond, claimed to have been executed by this defendant, it manifestly appearing from said bill that this defendant is a corporation organized, created and existing under the laws of the United States enacted for the purpose of organizing and conducting National Banks—and under which laws this defendant had no authority, right or power to execute any such alleged bond or indemnity, and the same, if executed, is null and void and wholly incapable of enforcement against this defendant.

Sixth. That it appears by the said bill that the same is exhibited against this defendant and the several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof as appears by the said bill, this defendant is not in any manner interested or concerned, and that this bill is altogether multifarious.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto and humbly demands the judgment of this court whether it should be compelled to make any other or further answer to the said bill; and prays to be hence dismissed with its costs and damages in this behalf most wrongfully sustained.

FARMERS & MECHANICS NATIONAL BANK.
By C. T. HITESHEW, *Cashier.*

V. B. ARCHER,
Att'y for Def't.

Verification of Demurrer.

STATE OF WEST VIRGINIA,
Wood County, To wit:

C. T. Hiteshew, makes solemn oath and says that he is the cashier of the above named defendant, the Farmers & Mechanics National Bank of Parkersburg, West Virginia, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

C. T. HITESHEW.

104 Subscribed and sworn to before me this 30 day of October 1907.

[NOTARIAL SEAL.] E. L. MIKESELL,
Notary Public for Wood County, West Virginia.

Certificate of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

V. B. ARCHER,
Counsel for Defendant.

Decree Submitting Cause on Demurrers, etc.

And at another day, to-wit: On the 20th day of November, 1907, the following order was made and entered of record, to-wit:

In Equity.

UNITED STATES FIDELITY & GUARANTY CO.
vs.
M. J. BRAY and Others.

On November 19, 1907, the complainant, by B. M. Ambler, its counsel, moved the court to grant an injunction upon its bill as prayed, this being the day heretofore appointed for hearing such motion, and complainant filed in support thereof a copy (certified by Thos. A. Brown, Referee) of depositions of M. J. Bray, P. W. Frey & — Reitz, taken at Evansville, Indiana, in September, 1907, and on motion of complainant leave is given to amend the caption of the bill, by alleging that the Second National Bank and the Farmers & Mechanics National Bank are "citizens of and residents in the State of West Virginia in the Northern District of West Virginia."

And complainant further moved that the court set down for argument demurrers of City National Bank, of Citizens National Bank and of First National Bank, all of Evansville, Indiana, and of Farmers Bank, of Rockport, Indiana, and of First National Bank of Rockport, and of M. J. Bray, and of Laura Eichel and of Jacob Eichel, and of the Second National Bank of Parkersburg and of the Farmers & Mechanics National Bank; and complainant's counsel also called attention of the court to the stipulation with the two last named banks, which is ordered to be filed, that the demurrers of said banks be submitted, to be heard upon briefs to be filed with
105 the judge of the court within ten days from this date, and leave is granted the parties to file briefs on the demurrer of the two banks last named.

And the matters arising upon the other demurrers and upon the motions filed to dismiss the bill, and upon the motion filed to dissolve and vacate the restraining order, and upon the complainant's motion for an injunction—came on to be heard; and thereupon the defendants Laura Eichel, Jacob Eichel and the defendants The City National Bank of Evansville, The Citizens National Bank of Evansville, The First National Bank of Evansville, and The Farmers Bank of Rockport, and the First National Bank of Rockport, (Indiana banks) tendered at the bar the affidavits of Jacob Eichel, of Laura Eichel and of P. W. Frey and M. J. Bray in opposition to plaintiff's motion for an injunction, and to the filing or consideration of said affidavits and of each of them the complainant by counsel excepts and objects on the ground among others, that the demurrers have not been disposed of; that the parties are not entitled to file affidavits upon the merits while standing out and filing no answer; and on

the ground that said affidavits are not proper and no notice thereof was given to complainant.

And the matters aforesaid were argued by the counsel for the respective parties (except the Second National Bank and the *Merchants* & Mechanics National Bank), and the court takes time to consider thereof, with leave to the parties to file briefs in fifteen days, and the court gives to complainant leave to file counter-affidavits if so advised.

And meantime, and until the court shall determine the question of granting an injunction, the restraining order heretofore awarded shall continue in force.

Depositions.

(Filed November 19, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

At the office of Madison J. Bray, No. 312 South First street, in the City of Evansville, Indiana, on this, the 4th day of Sep-
106 tember, 1907, between the hours of nine (9) A. M. and six (6) P. M. of said day.

Present: J. A. Dupuy, attorney for Madison J. Bray, Trustee;

Present: B. M. Ambler, attorney for The United States Fidelity and Guaranty Company.

Upon motion of Mr. DuPuy, there being no witnesses present to-day the taking of depositions under said notice is adjourned over until to-morrow morning at nine (9) o'clock at this place.

At the office of Madison J. Bray, No. 312 South First street, in the City of Evansville, Indiana, on the 5th day of September, 1907, between the hours of nine (9) A. M. and six (6) P. M. of said day, pursuant to adjournment on yesterday, as above noted.

Present: Adolph F. Decker, Notary Public for Vanderburg County, State of Indiana;

Present: J. A. Dupuy, attorney for Madison J. Bray, Trustee;

Present: B. M. Ambler, attorney for The United States Fidelity and Guaranty Company.

The following depositions were taken before the above Notary Public, pursuant to the above notice and adjournment, which notice is hereto attached.

MADISON J. BRAY, of lawful age, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes as follows:

Direct examination by Mr. J. A. DUPUY:

Q. 1. Your name, Mr. Bray?
A. Madison J. Bray.
Q. 2. Residence?
A. Evansville, Indiana.
Q. 3. You are the trustee of the estate of the bankrupt, The Evansville Contract Company, are you not?
A. I am.
Q. 4. Mr. Bray, were you in the city of Evansville on the 12th day of April, 1907, when Mr. Charles F. Wood and Mr. Martindale, the representative of The United States Fidelity and Guaranty Company, were in this city?
A. I was.
Q. 5. Were you present at any conference had between these men and their local attorney, Mr. Cunningham?
A. I was.
107 Q. 6. Were you invited to that conference, or did you go volunta——
A. I was invited.
Q. 7. What was your first information as to their presence in the city of Evansville?
A. Mr. Cunningham telephoned me that they were here and would like to talk to me.
Q. 8. Are you now or have you at any time been the owner of any claim or claims against the bankrupt, The Evansville Contract Company, or its estate, since the bankruptcy?
A. I don't own them.
Q. 9. Do you now or have you at any time owned any claim or claims against that estate?

Counsel for the Fidelity Company objects to the question as leading.

A. No, sir.
Q. 10. What statement, if any, did you make to Messrs. Wood and Martindale on the occasion above referred to regarding your ownership or supposed ownership of any of such claims?
A. Mr. Wood asked me what interest I had in those claims and I told him that I helped Mrs. Eichel raise the money to buy the claims and that I held them as security for that note; then Mr. Wood said to me, "Then you are virtually the owner of those claims;" "Well," I said "I suppose I am that way." That is what was said.
Q. 11. In what way, as a matter of fact, have you or did you help Mrs. Eichel touching the matter just referred to in your last answer?
A. Those claims would be sent to the City National Bank with a draft on P. W. Frey, then Frey would make a note to pay for those claims and I would sign the note with him and the bank held those claims as collateral up to May, 1906, when I paid the bank off and

took Mrs. Eichel's note direct and held the claims as security for the note.

Q. 12. You have not yet explained in what way you were thus helping Mrs. Eichel. I asked you to explain that.

A. Mrs. Eichel applied to the City National Bank for money to buy those claims, I recommended the loan to the bank, to Mr. Reitz, said I thought it would be a good one; Mr. Reitz then spoke up and said if it was a good loan I must put my name to it and then they would let her have the money, which I did. I have the original notes and every paper connected with them; if you want to see them they are at your disposal.

Q. 13. You can now show what connection the claims, which you say were sent to the bank, had with Mrs. Eichel as a purchaser.

A. She purchased the*m* at a discount; I had nothing to do
108 with it whatever; I never spoke to a human being about it; or had any talk about it, or had anything to do with it whatever.

Q. 14. Please explain the circumstances under which you became endorser or guarantor on notes in the City National Bank the proceeds of which—it has been testified—were used to purchase claims for Mrs. Laura J. Eichel.

A. Well, Mrs. Eichel applied to the City National Bank for money to buy these claims, I was present at the meeting of the board of directors at which this matter was discussed and advised the loan to be made; I told them I thought it would be a long loan but a good one, and Mr. Reitz, the president, spoke up and said, "if you think it is a good loan you put your name to it," and it wound up by my doing it.

Q. 15. What interest, if any, did you have as owner of the claims against the Evansville Contract Company which were bought with the money borrowed from this bank?

A. I held them as collateral, that is the bank held them up to May, 1906, and after that I paid the bank off and took them myself as collateral.

Q. 16. Referring now to the depositions and affidavits made recently by Messrs. Martindale and Wood, touching certain remarks which you are alleged to have made at the conference between themselves and others held in this city on the 12th day of April, last; please give us your version of that conference so far as your statements and conversations were concerned?

A. Well, I was asked what interest I had in these claims; I told Mr. Martindale—I think he is the one that put the question—that I helped Mrs. Eichel raise the money to buy the claims and that I held them as collateral to that note, security,—I think I used the word security—for that note. Then Mr. Wood came at me and he said, "then you are virtually the owner of those claims, "well," I said, "I suppose I am in that way." And then he remarked about the suit at Pittsburgh and thought I was the "moving power." I believe he said, and I told him I supposed I was in that way; then he kept saying to me that he had come to try to settle this matter up. I told him that we had gone to all this expense and I thought we had better

wait now until we could get a decision from the referee which would give us an indication of the law in the matter, and that I didn't care which way he decided, that as soon as that decision was made I would help him settle this thing up as quick as possible, as I was only too anxious to get it settled up; then they kept saying to me, several times, "we are not talking to you as trustee in this matter, but as Madison J. Bray, a private citizen," I think they said, well, I told them that I couldn't divest myself of the fact that I am the trustee and that comes first, and said I, "that makes me a kind of a
109 Poohbah in this matter and I don't know just what to do, I don't know where I stand," I believe those were my words, "but," says I, "just as soon as we can get a decision from the referee I will do all in my power to settle this matter up."

Q. 17. What, if anything, did you say, in regard to expressing your own opinion as to the legality or validity of the indemnity agreement which the banks, in April, 1904, gave to The United States Fidelity and Guaranty Company?

A. I don't think I said anything at that meeting; I don't think anything was asked of me; but Mr. Wood was rat-ling along in his talk and saying just how the referee was going to decide the question and just how the money was going to be divided, fixing the thing all up to suit himself, and I said to him, "you had better not go so fast; other people have to have something to say in this matter besides you." I said, "you have made the representations that you hold a lien on all those percentages and all this plant and this representation may be questioned." I never said I was going to question it; the personal question wasn't asked of me by them.

Q. 18. Did you on that occasion give utterance to your own opinion upon the validity of that contract one way or the other?

A. No, sir, I did not.

Q. 19. I understand you then to say that the only remark you made was one of caution to him that others might question it.

A. That someone might raise that question. I told Mr. Reitz—he was in the meeting at that time—that I considered that contract good, that indemnity good, and that it would have to be paid.

Q. 20. Then you, as I understand, deny that on the occasion of the interview above referred to you made a statement to the contrary?

A. Sure, I have always held that good.

Q. 21. In the deposition given by Mr. Martindale, about the middle of page nine of my copy, is the following language: "He (referring to Mr. Bray) was of opinion, having been so advised by his counsel, that The United States Fidelity and Guaranty Company was liable upon its original bond to the government of the United States for labor and material entering into the work covered by these contracts, hence the claims which he (Bray) had purchased were perfectly good against the United States Fidelity and Guaranty Company for any deficiency after the distribution of the assets in bankruptcy, and having purchased these claims at a discount he had a profit in pursuing the course he was taking and did not believe any settlement could be arrived at unless the guaranty company was prepared to

admit his proposition of law and make settlement in accordance therewith." Did you make that statement?

A. Not in that way.

110 Q. 22. In what way did you make it?

A. Not at all. Wood and I got into a dispute about these claims, he said he would not pay them and I said he should; he said he would never pay them until the highest court in the land had decided he must and I said he wasn't expected to pay them until then, but that I thought he would pay them when we struck the last court.

Q. 23. That is a part of what I read you; what is your answer to the balance?

A. About buying the claims?

Q. 24. Yes, sir.

A. That wasn't spoken of at all.

Q. 25. How about the portion of that statement which says that you had been advised by counsel touching that matter?

A. I had been advised by counsel that those claims were good.

Q. 26. How about the further statement made in that deposition to the effect that you had employed counsel to advise you as to the validity of the guarantee given by the banks?

A. Never was thought of; I was never asked any questions about it whatever.

Q. 27. I will ask you whether The United States Fidelity and Guaranty Company is liable for the payment of the so-called preferred claims? Has any question of that sort ever been put to you? Has any one ever denied it or questioned it?

A. No, Wood said he wouldn't pay them until the last court was reached, he would carry it to the last court in the land, that is all; I told him that is just where we expected to go to.

Q. 28. The statement is made in these depositions to the purport and effect that you had employed Mr. Frey, an attorney of this city, paying him possibly out of the funds of this estate, to advise you as to the validity of the indemnity agreement the banks gave The United States Fidelity and Guaranty Company. What have you to say to that?

A. I never asked Mr. Frey anything about it, or any other lawyer, or paid any body a cent for their opinion on that subject.

Q. 29. I will ask you now as to the indemnity which I believe you gave to the First National Bank of this city, if the paper I hand you is a correct copy of that indemnity; I will read it to the Notary so that he may incorporate it in his notes.

A. This is a copy.

Mr. DUPUY: The paper above referred to is in the words and figures following, to-wit:

"In consideration of the payment of one dollar ($1) receipt of which is hereby acknowledged, and in further consideration of the fact that the First National Bank of Evansville, Indiana, did

111 assign, sell (without recourse), transfer and set over unto Jake Eichel all its right, interest, claim and demand in and

to certain notes against the Evansville Contract Company as referred to in article of agreement (a copy of which is hereto attached).

I, the undersigned, hereby agree that I will protect, indemnify and save harmless the First National Bank of Evansville, Indiana, against all loss, damages, and liability of any kind that they have assumed or shall hereafter incur by reason of the execution of a bond to the United States Fidelity and Guaranty Company in the sum of seventy-five thousand dollars ($75,000) bearing date of April 4th, 1904.

Witness my hand and seal.

M. J. BRAY.

Witness:

F. A. FOSTER."

Q. 30. Please state the circumstances under which you gave that indemnity to this bank?

A. Well, the First National Bank, as you have been told, was in liquidation on account of the expiration of its charter, and there was money enough in the bank to pay a five per cent. dividend, but Mr. Reitz felt that he couldn't pay the dividend as long as there were any obligations due from the bank, and then he made the remark to me "Now, if you will—" his remark was, "If you will indemnify Mr. Eichel we will declare a dividend," and I told him—a day or two afterwards, I believe—no, I think I told him right at the time that I would do it; Mr. Eichel a few days before had bought the claims of the bank and given it an indemnity against that indemnity bond of the banks, but Mr. Reitz wanted mine as a kind of a security to that, and I gave it to him.

Q. 31. Did you give any other indemnity to that or any other bank in regard to its liability towards the United States Fidelity and Guaranty Company?

A. No, sir, I did not.

Q. 32. Did you give an indemnity to the City National Bank?

A. No, sir.

Q. 33. How long had you been connected with the First National Bank, the one to which you gave that personal indemnity?

A. Oh, I don't know; I have been more or less actively connected with that bank all my life in some kind of way; I think I went into the directory in, I believe it was the latter seventies or the first part of the eighties; I don't remember just when; my father was one of the original charter members I believe and I have been connected with it ever since.

112 Q. 34. I believe that bank signed this indemnity given to the United States Fidelity and Guaranty Company, did it not?

A. Yes, sir.

Q. 35. Did you bring that matter to the attention of that bank, the question of signing that indemnity?

A. The first indemnity do you mean?

Q. 36. The indemnity to the United States Fidelity and Guaranty Company?

A. Yes, sir.

Q. 37. And, as I understand you, later on when they asked you to indemnify them against their own indemnity, you consented to do so?

A. Yes, sir, in the latter part of November, 1906.

Counsel for the Fidelity Company calls attention to the paper signed by Mr. Bray and which has just been copied as referring to an article of agreement, "a copy of which is hereto attached," and counsel calls for the production of the balance of that paper in the agreement mentioned.

Counsel for the trustee replies that no such papers are in the possession of his client and that if any be in existence they must be in possession of the bank.

Mr. Ambler states that the paper is incomplete because it omits the agreement, which is a part of it.

Mr. Bray: The agreement referred to herein is the agreement of Mr. Jacob Eichel in which he agreed to indemnity the banks and my indemnity was merely to brace up his, nothing more.

Q. 38. Mr. Bray, have you sought advice from any counsel—if so, please state whom—touching the validity of the agreement between these banks and The United States Fidelity and Guaranty Company?

A. No, sir.

Q. 39. Much has been said in the depositions of Martindale and Wood as to your own private opinion on that question.

A. I have always considered their indemnity bond as good and the banks would have it to pay.

Q. 40. Much was said by them as coming from you on the occasion of the interview above referred to to the effect that you told them the agreement was invalid. What have you to say to that?

A. That is a mistake; I never said it.

Q. 41. Have I asked you with reference to the statements of Wood and Martindale in regard to what they said about your having undertaken to employ Mr. Cunningham, of this place, to represent yourself and Mr. Eichel in the prosecution of the suit which Laura J. Eichel had brought in Pittsburgh against The United States Fidelity and Guaranty Company? If not, please tell me what you have to say in reply to their statement.

113

A. Mr. Cunningham was never spoken to in regard to that suit except that we received a letter from the Parkersburg bank asking us to share the expense of defending these suits, and I am not certain whether that letter came from the Parkersburg bank or from the Fidelity Company, but anyway, I brought Mr. Cunningham in to represent the First National Bank and Mr. Frey was there representing the Citizens National Bank, and we framed a letter to the sender ordering them to go to no expense on our account whatever to defend those suits.

Mr. Ambler: Testimony regarding letter or letters not produced, and of which no notice is given, is objected to.

Mr. Bray: I think I can get the letter if you want it.

Mr. DUPUY: If you can find such a letter, please produce it and file it with your deposition.

Mr. BRAY: I think I can.

Q. 42. Then I understand you to say, Mr. Bray, that the only matter about which you consulted Mr. Cunningham in connection with Mr. Frey was to seek their advice as to whether these two banks here you have just named should defend the suit Mrs. Eichel brought, instead of prosecuting it?

A. They were simply consulted to frame that letter and nothing else; simply to frame a letter to The United States Fidelity and Guaranty Company saying that we would go to no expense to defend the suit.

Counsel for Guaranty Company objects to testimony regarding letter or letters not produced and of which no notice is given.

Q. 43. In the affidavits filed herein by Messrs. Martindale and Wood they state that Mr. Reitz told them that the City National Bank had an indemnity from you; is that a fact?

A. They have none.

Q. 44. In their depositions, given a short while after their affidavits were made, they used language which purports to say you had given indemnity to all the banks that had signed that indemnity to the United States Fidelity and Guaranty Company.

A. I have given no indemnity to any bank except the First National Bank of this city.

114 Q. 45. Mr. Wood in his deposition states, in regard to what he gathered from the conversation at that conference—he uses this language: "I gathered from the conversation that Mr. Bray was speculating in the claims." What have you to say to that?

A. I don't know what he calls it; I helped Mrs. Eichel to buy the claims, I don't know whether you would call that speculation or not.

Q. 46. Have you speculated in these claims?

A. I don't know whether I have or not.

Q. 47. You wouldn't do it without knowing it, would you?

A. No, sir.

Q. 48. Mr. Wood in his deposition, further on, uses the following language: "On April 12, at Evansville, I went to Evansville supposing I was to enter negotiations and deal with certain banks who had become indemnitors for us, and my object was to try and reach some compromise agreement which would be satisfactory to all, and I found that everywhere I went I came up against Mr. Bray; I was unable to get around him or away from him, or to have any negotiations or deal with anybody except Mr. Bray." Please state to what extent you harrassed this gentleman in town here?

A. I don't know, I never saw him but once and that was up there at Mr. Cunningham's office.

Q. 49. Did you interfere with his negotiations when he was trying to have them with these banks?

A. I only went there when he sent for me, that is all.

Q. 50. Who is counsel for the First National Bank of this city?

A. Cunningham.

Q. 51. How long has he been counsel for that bank?

A. A long time. Mr. Garvin had been counsel for forty or fifty years and Mr. Cunningham married his daughter, and then it was Garvin & Cunningham, and now it is Cunningham.

Q. 52. What are Mr. Cunningham's initials?

A. George A.

Q. 53. Mr. Bray, to what extent, if at all, did you become guarantor or surety for overdrafts in any bank in this city made by the trustees of The Evansville Contract Company?

A. I was surety for about twenty thousand dollars overdrafts, and about fifty thousand dollars legitimate loans.

Q. 54. Was that over and above the receiver's certificates?

A. No, fifty thousand dollars was receiver's certificates, twenty thousand dollars was overdrafts.

Q. 55. How long was that prior to the time, or was it prior to the time that you became surety for Mrs. Eichel in that bank?

A. It was long before that.

Q. 56. Long before the time you were surety for Mrs. Eichel?

A. Yes, sir; no, let's see; those claims were bought about
115 the middle of 1904; it was during that same time.

Q. 57. Were you in any wise consulted as to the terms upon which Mrs. Eichel, or her husband acting for her, came to purchase any of those claims that were bought with the money that was borrowed from this bank?

A. Not at all.

Cross-examination by Mr. B. M. Ambler:

X Q. 58. The claims that you referred to last as having been bought in connection with Mr. Frey; all of them were what were known as preferred claims, were they not?

A. So-called preferred claims.

X Q. 59. They are the same claims on which suits have been brought in Pittsburgh in the name of Laura J. Eichel against the Fidelity Company, are they not?

A. Yes, sir.

X Q. 60. When you saw Messrs. Wood and Martindale here last April you knew that those suits had been brought in Pittsburgh?

A. Yes, sir.

X Q. 61. Didn't Mr. Wood tell you in that interview that his company would never pay those claims as long as they could be contested?

A. Yes, sir.

X Q. 62. In those suits?

A. Yes, sir; and I told him we didn't expect them to.

X Q. 63. Did you tell him what interest you had in prosecuting them?

A. I told him that I helped Mrs. Eichel raise that money and I held those claims as security to the note.

X Q. 64. Did you have in mind at the time that Messrs. Wood and Martindale were here for the purpose of trying to reach an

adjustment with these indemnifying banks in order that the company might be relieved of its liability?

A. Yes, I rather think I did.

X Q. 65. And didn't you then know that the object of Mr. Wood and of Mr. Martindale was to get an adjustment whereby the banks would make good the indemnity that had been promised under that paper of April, 1904?

A. Yes, that is what they were here for.

X Q. 66. Can you tell me when it was that you commenced to buy up those claims that you have mentioned?

Counsel for Trustee objects to the question for the reason that the witness has never stated that he ever bought up any claims, on the contrary he denies it.

X Q. 67. Can you tell me when the purchase commenced of those claims for which you applied your credit in some way?

A. About the middle, I guess of 1904.

116 X Q. 68. You mean two months after the bankruptcy?

A. I can tell you exactly if you will let me go to my books.

X Q. 69. I wish you would.

A. (Referring to account book.) The first claim was brought May 31, 1904.

X Q. 70. What claim was that?

A. Lombard Iron Works, of Augusta, Georgia.

X Q. 71. Have you made a list of those claims?

A. I have.

X Q. 72. And the date of the purchases?

A. Yes, sir.

X Q. 73. May I look at it?

A. Sure. This list is the claims I had anything to do with only.

X Q. 74. You show me a large account book entitled, at page 302, "Frey Accounts," containing a list of claims, some of which are marked in two columns; for instance:

1904, May 31, Lombard Iron Works 2,166.30 1,582.37 Does not the first column show what was the amount or face of the claim and the second show the amount paid for it?

A. Yes, sir.

Counsel for the trustee objects for the reason that it is a matter entirely irrelevant to the issues here as to what Mrs. Eichel paid for those claims.

X Q. 75. Where there are two columns given on these claims does not the first column show the face of the claim and the second column show the price paid for it?

A. Yes, sir.

X Q. 76. Will you permit the notary to copy in full, as a part of your deposition, that account at which we are both now looking, being page 302?

A. I will.

To which counsel for trustee objects upon the ground that it is inadmissible and immaterial.

X Q. 77. Do the statements contained on that sheet show the truth, to the best of your knowledge and belief?

A. Just exactly, to a cent.

X Q. 78. Under date of December 31, 1906, I quote the last entry on that page as follows: "This acct. was settled by J. Eichel paying all interest to date, 1,773.27, and note of Laura and J. Eichel for 27,037.39." In whose handwriting is that entry?

A. Mine.

X Q. 79. Is that the truth?

A. Sure.

X Q. 80. Can you tell me whether or not that note is the note that funded all of the obligations and expenditures made in acquiring these claims?

A. It is.

117 Mr. AMBLER: The notary is requested and instructed to take a copy of that page 302 and file it as part of the deposition of Mr. Bray and made a part of his deposition, marked Exhibit "A."

X Q. 81. I observe that the purchase of these claims commenced on the 31st of May, 1904, and ran through June, July, September, October, November and July 27, the Parkersburg Mill Company, 5,005.57; also, under date of December 31, 1904; and under date of June 30, 1905, and December 27, 1905, there is an entry, "City National Bank, interest on above to date Bray;" does that not mean in those three entries that you paid the interest on the amounts then advanced?

A. Yes, sir, the amount that I paid.

X Q. 82. It appears that under that date of November 19, 1904, an order was made in the bankrupt court listing a number of claims in these words: "That the following claims are preferred claims and are so established in this decree as claims of that character," giving amounts under the following names: D. A. Rardin, Duncan & Porter, Parkersburg Mill Company, and others. Do you recognize that these are the same claims that are listed on your book under the head of "Frey Accounts," page 302?

A. Here is the Parkersburg Mill Company. Who are the others?

X Q. 83. Rardin and Duncan & Porter.

A. Duncan & Porter is here but I have got no Rardin.

X Q. 84. Referring now to the paper of indemnity signed by you, agreeing to save harmless the First National Bank against liability under its indemnity agreement of April, 1904, this paper refers to an article of agreement, "a copy of which is hereto attached," and I call for that article. Do you know what it refers to?

A. I think it refers to the transaction between Mr. Eichel and the bank; he guaranteed the bank and this is really supplementary to his because Mr. Reitz wouldn't pay the dividend unless he had good security against it; I really secured Mr. Eichel's bond.

X Q. 85. This paper says: "In consideration of the fact that the First National Bank of Evansville did assign, sell, transfer and set over unto Jake Eichel all of its interest in certain notes," etc. Do

you mean that there was an agreement of indemnity given by Mr. Eichel to that bank on that occasion?

A. Yes, sir, that is right.

X Q. 86. Don't you recall that that also included the claim of the City National Bank?

A. I don't think it does, because the City National Bank has other security on their note.

118 X Q. 97. State, if you know, who did indemnify the Second National Bank of Parkersburg and the Farmers and Mechanics Bank of Parkersburg?

A. I don't know anything about it; I never heard that they were indemnified.

X Q. 98. Referring to your interview with Mr. Cunningham, don't you recall that the Fidelity Company or some one on its behalf gave notice to the banks here at Evansville that proceedings were being taken to apply the fund in the hands of the trustees to the payment of these preferred claims and that they were called on to look after their interest in that regard?

A. No, I don't know anything about that.

X Q. 99. Referring now to the last memorandum on page 302 and to the note of Laura and J. Eichel for $27,037.39; please say where that note is now?

A. It is right in here (placing his hand on a large envelope).

X Q. 100. You mean you are the holder of it?

A. Yes, sir.

X Q. 101. Are you not also the holder of an assignment of those claims for the purpose of applying the same on that note if collected?

A. In the way of an agreement, yes.

X Q. 102. Have you got that agreement?

A. Yes, sir.

X Q. 103. Have you any objection to showing it to us?

A. None at all.

X Q. 104. Please let us see it.

Counsel for trustee objects to the agreement for the reason that the same is entirely irrelevant to any matters in issue before the court now.

A. Here it is.

X Q. 105. May I look at it, please?

A. Yes, there is the whole thing.

X Q. 106. You hand me a note dated Evansville, Ind., December 31, 1906, in these words: "On demand after date we or either of us promise to pay to the order of M. J. Bray twenty-seven thousand and thirty-seven and 39/100 dollars with attorney's fees; negotiable and payable at The City National Bank, of Evansville, Indiana, for value received, without relief from valuation or appraisement laws, with three per cent. interest after date, payable semi-annually. Signed Laura Eichel, J. Eichel." Is that the note to which you refer?

A. Yes, sir.

X Q. 107. Attached to that is a paper, undated, in the following words: "Hall and Metcalf, Attys., Gentlemen: You will please pay

to M. J. Bray all money collected by you on my claims against the Evansville Contract Co., Bankrupt. (Signed) Laura Eichel." Is that also an original paper?

A. That is right.

119 X Q. 108. And attached to that is a paper commencing with these words: "Laura Eichel having bought the following claims for material against the Evansville Contract Company, in bankruptcy: (The column on the left represents the par value of the said claims and the column on the right the price paid by the said Laura Eichel for the same," then follows a list of the claims aggregating as the face of the claims $36,663.82 and the price paid $27,037.39, and then follows, among other things: "It is agreed and understood that the claims now in the hands of Hall & Metcalf, attorneys, for collection, shall be held by the said Bray, who is to receive all moneys collected from the said claims and after said note is fully paid Bray is to retain as his share of the interest and profits of this transaction one-haf of all the money received by him from said claims over and above the face of the note; the balance is to be applied to any indebtedness due to him," etc. Is that correct?

A. Yes, sir, I guess it is. Let me see a minute. You had better read it all, hadn't you?

X Q. 109. I want the entire paper to go into evidence and I will ask your permission to have the entire paper, or a copy of it, inserted in your deposition.

A. You shall have a copy of it.

X Q. 110. I only read such portions as called attention so as to identify the paper. I did not read it in full.

A. You read everything but the last two lines.

X Q. 111. I beg your pardon, Mr. Bray, I did not read the list of claims, nor the paragraph immediately under the list of claims.

A. All right.

X Q. 112. Will you furnish to the Notary true and accurate copies, or allow him to make true and accurate copies of these three papers and identify them, to be filed with your deposition as exhibits Bray No. 1, Bray No. 2 and Bray No. 3?

A. He may copy them himself.

X Q. 113. Would it not seem from that paper that you are interested in claims amounting to over thirty-five thousand dollars, purchased for over twenty-seven thousand dollars, and that you are entitled to one-half over and above what is necessary to reimburse you for outlay and interest? Would you not call that a speculation?

A. Yes, sir, I guess you would.

X Q. 114. Referring again to these papers; are not Hall & Metcalf, referred to therein, the lawyers in Pittsburg who have brought these suits in the name of Laura Eichel against the United States Fidelity and Guaranty Company to which we have referred?

A. Yes, sir.

X Q. 115. Have you any interest in the claims represented by a note for about thirty-five hundred dollars that Mr. Frey is carrying?

A. None at all.

X Q. 116. Are you interested in any of the claims of the general creditors that have been assigned to Mrs. Eichel?

A. Not a one.

X Q. 117. Your entire interest is in these preferred claims, isn't it?

A. Yes, sir.

X Q. 118. And at the time they were purchased you considered them preferred, did you not?

A. Yes, sir.

X Q. 119. And were you not at that time trustee and expecting to pay them out of the funds received from the operations of the company?

A. I was one of the trustees; if the company had enough money we expected to pay them.

X Q. 120. Didn't you understand that they were preferred and they were to be first paid out of the funds?

A. That was the thought, yes.

X Q. 121. Who made application to the City National Bank on behalf of Mrs. Eichel for the loan that you mentioned?

A. She made it herself.

X Q. 122. Was she there personally?

A. I think Mr. Eichel wrote a letter, or Frey, one of them, I don't know which. There was a letter there applying for the loan.

X Q. 123. These claims were purchased by drafts drawn on Mr. Frey and notes made by you and him were substituted for the claims as they came in; is that right? And subsequently a general big note was given to include the little ones in a settlement with the bank. Is that true?

A. I think that it was; I think those little notes remained until I took them up in May, 1906; I took them up, I have them here.

X Q. 124. And you carried those notes in that sort of shape until December 31, 1906, until Mr. and Mrs. Eichel gave you this big note for twenty-seven thousand and thirty-nine dollars in settlement?

A. I think that was it.

X Q. 125. What, if anything, has been paid to you by Mr. or Mrs. Eichel on account of that note for twenty-seven thousand and thirty-seven dollars?

A. Nothing on the principal.

X Q. 126. At the time of the expiration of the charter of the First National Bank of Evansville, and after it went into liquidation, what monied institution succeeded it? Did not the City National Bank succeed it?

A. In a certain sense it did; we bought their good will, stock and fixtures but it wasn't the same organization by any means.

X Q. 127. You continued business at the old stand, too?

A. Yes, sir, it continued business at the old stand.

X Q. 128. When Mr. Wood and Mr. Martindale told you in April that they were not talking to you as trustee did you not understand them to mean that the reason they had sent for you was because they found that you were indemnifying one or more of the
121 banks and that they wanted to find out who to deal with in getting a general adjustment?

A. Yes, I think that was their understanding.

X Q. 129. You understand that they were not asking you as an official and as a trustee to make any disposition of the funds in your hands, wrongfully or otherwise?

A. No, sir, I didn't understand it so.

X Q. 130. Have you any other agreement with Mrs. Laura Eichel with relation to these claims, in writing, outside of these three papers, Bray No. 1, Bray No. 2 and Bray No. 3?

A. No, sir.

X Q. 131. And you commenced in May, 1904, acquiring these claims and did not get anything in writing from her until the thirty-first of December, 1906? Is that right?

A. I think I have a writing here from Frey showing the status of us both.

X Q. 132. I would like to see it.

A. Here it is.

X Q. 133. You hand me a paper dated Evansville, Indiana, December 12, 1904, addressed to you as trustee and signed by Philip W. Frey, commencing with these words:

"Whereas, I am the owner by assignment of the following claims, which are duly proved in bankruptcy in said estate * * *

"And, Whereas, the same are established as preferred claims and payable out of the assets of said estate first after the costs of administration and before general claims shall be allowed to participate in any distribution, which said preference was established by decree of the said referee, under date of November 19, 1904:

"And, Whereas, the same are attached as collateral to a number of notes given to the City National Bank of Evansville, Indiana, by the undersigned," etc.

I beg to ask whether you have any objection to filing a copy of this paper with your deposition, marked Exhibit Bray No. 4? Will you do so?

A. Sure.

The Attorney for the trustee objects to the introduction of these promiscuous contracts and agreements, which are entirely outside of any of the issues which have been raised in any of the pleadings now before this court.

X Q. 134. I notice that that paper directs you to pay over to the City National Bank " in addition to the amount represented by my said notes, one-half of the remainder of the amount of the claims which may be due and payable to me by reason of my
122 ownership thereof," and I now inquire whether the claims there annexed are the same in part or in whole as those shown on what you call the "Frey Accounts?"

A. Yes, sir, they are the same.

Mr. AMBLER: The Notary is specially requested to copy, compare and file the four papers last mentioned.

X Q. 135. Do you remember that in the fall of 1904, and before the making of this order of November, 1904, Mr. Eichel testified

and identified certain claims as being those which were proper to be preferred?

A. There was something like that done.

X Q. 136. Don't you know that that was done, you and Mr. Frey participated in the proving of those preferred claims in November, 1904?

A. There was something like that done.

Attorney for trustee objects to the question for the reason that the testimony is in the record and is the best evidence of who testified and what was testified to.

X Q. 137. Don't you also recall that the testimony offered by Mr. Eichel, by you and by Mr. Frey to prove those preferred claims was after you had acquired them, or Frey had acquired them?

A. I don't remember about that—the date—I had nothing to do with that anyway, I didn't know whether they were preferred or not, or anything about them.

X Q. 138. But you had furnished the credit to take them up, hadn't you?

A. I had helped Mrs. Eichel take them up.

X Q. 139. Are you sure that you are helping Mrs. Eichel or Mr. Frey under the contract here of December 12, 1904?

A. Mr. Frey represented Mrs. Eichel.

X Q. 140. You have handed me a number of papers purporting to be drafts drawn on Mr. Philip W. Frey, immediately followed by notes executed by you and Mr. Frey to cover the same. Please look now as I read over some of these and I take them in the order in which they come, tabulating them as follows: Draft, July 6, 1894, by A. Heine, $940.95, and attached to that is a note signed by Mr. Frey and by you, payable to the City National Bank, for $942.35.

A. That is right.

X Q. 141. Does that cover the same transaction?

A. It does, sir.

X Q. 142. Was A. Heine, who made that draft, one of the trustees?

A. Yes, sir, and the bookkeeper of the company.

X Q. 143. June 10, draft on Philip W. Frey, in favor of C. D. Dotson, signed J. Eichel for $1,771.41; also draft June 13, 1904, on Philip W. Frey, by J. Eichel, to the Monongahela River Coal — for $2,291.49; and to these two drafts is attached a note of June 15, 1904, signed by yourself and Mr. Frey, for $4,062.96; did that note cover these two drafts for about that amount made by J. Eichel?

123

A. Yes, sir.

X Q. 144. The draft for $1,771.47 is in favor of C. D. Dotson; was that for the purchase of one of the preferred claims?

A. Yes, sir.

X Q. 145. A draft July 1, in favor of Withers & Vandeventer, for $2,794.62, covered by the note of yourself and Frey; does that refer to the same transaction?

A. Yes, sir.

X Q. 146. A draft June 1, 1904, in favor of the Variety Iron Works, $5,878.40, drawn by J. Eichel and covered by a note dated June 2, made by yourself and Mr. Frey.

A. That is right.

X Q. 147. A draft July 27, 1904, by J. Eichel, in favor of the Parkersburg Mill Company, for $4,505.03, covered by a like note; Do they cover the same transaction?

A. Yes, sir.

X Q. 148. A draft in favor of Duncan & Porter Company, made by J. Eichel on Mr. Frey for $368.00 and covered by a like note; is that correct?

A. It is.

X Q. 149. A draft dated June 1, 1904, in favor of the Clydesdale Stone Company, for $3,606.30, drawn by J. Eichel on Mr. Frey and covered by a note made by you and Mr. Frey; is that right?

A. That is right.

X Q. 150. Mr. Bray, you tell me that you have produced in this package from which I have been reading all the drafts and notes covering the acquirement of these claims?

A. Yes, sir.

X Q. 151. Can you find any single one of them that isn't drawn either by J. Eichel, or by the owner of the claims, or by A. Heine, one of the trustees?

A. Not that I know of.

X Q. 152. Mrs. Laura Eichel was not at that time engaging very actively in the plan, whatever it was?

A. Not that I know of.

X Q. 153. Refreshing your recollection by the paper dated December 12, 1904, don't you recall that the original idea was that Mrs. Eichel was not in the transaction at all?

A. No, I don't recall that; Mr. Frey was acting for her.

X Q. 154. I suppose you are aware that the Fidelity Company had no books or accounts covering any of the material or labor transactions, but that the same were under the control of the Evansville Contract Company and its managers?

A. I don't know anything about what the company had.

X Q. 155. I mean don't you know that the only information that the Fidelity Company could get with regard to claims alleged against bonds given by that company on account of the Evansville Contract Company had to be derived from the books and officials of the Evansville Contract Company?

124 To which question counsel for the trustee objects, because the record in this very proceeding to which the United States Fidelity and Guaranty Company, at the first meeting of the creditors, made itself a party, shows what claims were proven, and the records further show what evidence there was tending to place certain of these claims within the so-called preferred class, all of which is separate and apart from the books of the company.

A. They could apply to the original people; they could get the information from the people who furnished the goods.

X Q. 156. I understand you to state that you did not tell Mr. Wood or Mr. Martindale that there was no question about the validity of the indemnity contract given by the banks so far as you were concerned, but that somebody else might raise that question?

A. Yes, sir.

X Q. 157. I also understand you to say to-day that you do believe and have always believed that the indemnity contract given by the banks was binding on the banks.

A. I do, unless that misrepresentation could be maintained.

X Q. 158. Did you not take the position with Mr. Wood and Mr. Martindale that you proposed to make the company pay the amount of those preferred claims which were being litigated in Pittsburg, and that you would be relieved from your indemnity to the banks because you didn't think that was any account?

A. I did not; I told him that I thought he would have to pay those claims, but I didn't say that the banks would be relieved.

X Q. 159. And at the time you bought those claims you understood that they were the first things to be paid out of the funds of the bankrupt estate?

A. We thought that way then.

X Q. 160. And you thought just as stated by Mr. Frey in his paper of December 12, 1904?

A. Yes, sir.

X Q. 161. And you are the successor of Mr. Frey in the holding of these claims, as I understand it, are you not?

A. Yes, sir.

Redirect examination by Mr. DUPUY:

R. D. Q. 162. You have just been asked as to what you at one time thought was the status of those claims called preferred claims, at that time had you ever seen the contract between The United States Fidelity and Guaranty Company and the Evansville Contract Company under which it was claimed that that class of creditors had a priority?

A. I had not.

125 R. D. Q. 163. Had that contract ever been exhibited to you and your co-trustees or attorneys?

A. No, sir.

R. D. Q. 164. For how long after the institution of these bankruptcy proceedings was that contract withheld from this record?

To which question counsel for Guaranty Company objects, on the ground that it is improper, unwarranted, irrelevant and immaterial.

A. I have never seen it, if it is in the record, that I remember of.

Counsel for Fidelity Company protests that no contract has ever been withheld from the record; it never became material to set up in a pleading in the case until after Mr. Bray and others had, without the knowledge of the Fidelity Company, acquired the several claims which are now sought to be collected against the Fidelity Company, and the proceedings by the Fidelity Company were not commenced

until after the parties who had been instrumental in proving those claims as being allowances against the funds and against the Fidelity Company's bond concluded or were instrumental in seeking so to change the situation as to appropriate all of the funds in the hands of the court and throw the entire loss upon the company that they had agreed to indemnify.

Counsel for the trustee protests that the foregoing charges are not supported by the facts of record, and that the contract under which The United States Fidelity and Guaranty Company claims it has a lien or priority upon this fund was, for some reason best known to them and unexplained to this record, literally withheld *for* the record for practically two years after the institution of these proceedings, which fact is shown by the record, and parties holding claims against the estate, as well as the trustees and their counsel, had no means of knowing what was the basis of the supposed lien which this company claimed to have until the filing of its petition herein, eighteen months or two years after the proceedings were instituted.

Counsel for the Fidelity Company again protests and relies upon the record.

R. D. Q. 165. You were asked upon cross-examination of the United States Fidelity and Guaranty Company had any means of knowing what claims there were in the way of labor
126 and material except such information as they got from the officers of the company. I ask you now if such information was sought from the officers of this company, and if so, whether it was furnished them so far as it could be done?

A. I think it was sought and furnished them by the trustees after bankruptcy from the books of the company, and they could have found out from the original parties if they had wanted to.

R. D. Q. 166. You know as a matter of fact that at the first meeting of the creditors of the Evansville Contract Company this United States Fidelity and Guaranty Company, through its counsel Mr. B. M. Ambler, did make itself a party to those proceedings in this sense, that it proved a claim in this proceeding for premiums upon certain bonds, did it not?

Counsel for the Fidelity Company objects to the statement as certainly erroneous.

A. Yes, sir.

R. D. Q. 167. You were asked upon cross-examination if it was not a fact that Mrs. Eichel took no active part in buying those claims. I don't know that I got your answer.

A. I don't know that she did.

R. D. Q. 168. What do you mean by taking no active part?

A. I didn't see her do it; I don't know anything about what she did; I only talked with Mr. Eichel and Mr. Frey on the subject, and whether Mrs. Eichel went around and bought those claims I do not know; she never talked to me on the subject.

R. D. Q. 169. Do you mean for us to infer that she did not buy them?

A. She didn't talk with me on the subject; she bought the claims, but she didn't in person. He asked if she was personally active, as I remember it, and I say I didn't see her going around buying the claims, nor did she talk to me on the subject.

R. D. Q. 170. You were asked on cross-examination with reference to the testimony which was taken in this proceeding in the Fall of 1904, in regard to establishing certain of these debts as what was then called preferred debts, and you were asked as to who testified, and so on. Is it the fact within your knowledge that subsequent to the decree establishing those claims as preferred claims the referee reheard that decree and set it aside?

To which question counsel for Fidelity Company objects on the ground that it is incompetent and improper.

A. No, I don't remember it.

127 R. D. Q. 171. Were you not present, Mr. Bray, when that contest was made about setting aside that decree?

A. Yes, I believe I was; I can remember something about it, but not much.

R. D. Q. 172. You were in Parkersburg at the hearing on that matter on the petition of Eigenmann, were you not?

A. Yes, sir.

R. D. Q. 173. The argument continued a day or more, didn't it?

A. Yes, sir, and the question was opened up again.

(Signed) MADISON J. BRAY.

Exhibit "A" Bray.

Frey Ac'ts.

1904.					
May 31	Lombard Iron Wks	Augusta, Ga	2,166.30	1,582.37	
June 2	Variety Iron Wks	Cleveland, O.	7,348.00	5,878.40	
4	Clydesdale Stone Co.	Pittsburgh	6,185.33	3,606.30	
15	C. D. Dotson	Parkersburg	2,084.08	1,771.47	
"	The Monongahela R. C. & C. Co.	Pittsburgh	4,582.98	2,291.49	
"	The Duncan & Porter Co.	"	460	368	
July 5	Wikers & Vandevender	Parkersburg	3,000.	2,797.42	
9	Hall & Adair—Pttsbg.—chk. Bray			75	
11	E. L. Neal	Parke-sbg	1,054.50	940.95	
22	E. L. Oles " Chk. Bray		148.20	133.38	
Sept. 17	S. E. Lime & Cement Co.	Charleston, S. C.	2,806	2,500	
Oct. 20	D. C. Martin & Co.	Parkersbg	372.15	334.94	
Nov. 21	Cramer & Son	" Chk Bray	459.69	321.74	
				4.50	
July 27	Parkersburg Mill Co.		5,005.59	4,505.03	
Dec. 31	City Nat'l Bk. Int. on above to date Bray			829.25	
1905.					
June 30	" " " " " " " "	Bray		400.96	
Dec. 27	" " " " " " " "	31st Bray		827.12	
1906.					
Jan. 27	Paid City Nat'l Bank for above claims except three		26,701.86	26,582.27	
	Int. to date			119.60	

Previously paid for—

July	9	1904	Hall & Adair	75.00	
"	22	"	E. L. Oles	133.38	
Nov.	21	"	Cramer & Son	321.74	530.12
Dec.	31	"	Int. on above to date		829.25
June	30	1905	Do.		400.96
Dec.	27	"	Do.		827.12
Dec.	31		This acct. was settled by J. Eichel paying all interest to date $1,773.27 and note with Laura Eichel & J. Eichel for		$27,037.39

A true copy.

ADOLPH F. DECKER,
Notary Public.

[NOTARIAL SEAL.]

128 EXHIBIT NO. 1 BRAY.

$27,037.39. EVANSVILLE, IND., *Dec.* 31, 1906.

On demand after date, we or either of us promise to pay to the order of M. J. Bray, twenty-seven thousand and thirty-seven & 39/100 dollars with attorney's fees; negotiable and payable at The City National Bank, of Evansville, Ind., for value received, without relief from valuation or appraisement laws, with three per cent. interest after date, payable semi-annually.

LAURA EICHEL.
J. EICHEL.

Due —.

A true copy.

ADOLPH F. DECKER,
Notary Public.

[NOTARY SEAL.]

EXHIBIT NO. 2 BRAY.

Madison J. Bray, 312½ South First St.

EVANSVILLE, IND., —, 190–.

Hall and Metcalf, Att'ys.

GENTLEMEN: You will please pay to M. J. Bray all money collected by you on my claims against the Evansville Contract Co., Bankrupt.

LAURA EICHEL.

A true copy.

ADOLPH F. DECKER,
Notary Public.

[OFFICIAL SEAL.]

129 EXHIBIT NO. 3 BRAY.

Laura Eichel having brought the following claims for material against "The Evansville Contract Co.," in bankruptcy:

(The column on the left represents the par value of the said claims and the column on the right the price paid by the said Laura Eichel for the same.)

Lombard Iron Works, Augusta, Ga.	$2,166.30	$1,582.37
Variety Iron Works, Cleveland, O.	7,348.00	5,878.40
Clydesdale Stone Co., Pittsburgh, Pa.	6,185.33	3,606.30
C. D. Dotson, Parkersburg, W. Va.	2,084.08	1,771.47
The Monongahela R. C. C. & C. Co., Pittsburgh, Pa.	4,582.98	2,291.49
The Duncan & Porter Co.	460.00	368.00
Wickers & Vandevender, Parkersburg, W. Va.	3,000.00	2,797.42
E. L. Neal, Parkersburg, W. Va.	1,045.50	942.35
E. L. Oles, Pittsburg.	148.20	133.38
S. E. Lime and Cement Co., Charleston, S. C.	2,806.00	2,500.00
C. C. Martin & Co., Parkersburgh, W. Va.	372.15	334.94
Kramer & Son, Parkersburg, W. Va.	459.69	321.74
Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59	4,509.53
	35,663.82	27,037.39

Now in consideration of M. J. Bray furnishing her the money to buy these claims, and at the low rate of interest of three (3%) per cent., for which money the said Laura Eichel has this day executed to M. J. Bray, a note for $27,037.39, due on demand, with attorney fees, negotiable and payable at the City National Bank of Evansville, Indiana, without release from valuation or appraisement laws, with three (3%) per cent. interest per annum from date, payable semi-annually, and endorsed by Jacob Eichel.

It is hereby understood and agreed that the said claims now in the hands of Hall and Metcalf, attorneys for collection, shall be held by the said Bray, who is to receive all money collected from said claims, and after said note and interest is fully paid, Bray is to retain as his share of the interests and profits of this transaction, one-half (½) of all the money received by him from said claims
130 over and above the face of this note. The balance he is to apply to any indebtedness due to him by Laura Eichel, and in case there is no such indebtedness, either direct or by indorsement, to pay the balance to the said Laura Eichel.

LAURA EICHEL.
M. J. BRAY.

A true copy—

ADOLPH F. DECKER,
Notary Public.

[NOTARY SEAL.]

EXHIBIT No. 4 BRAY.

EVANSVILLE, INDIANA, *December* 12, 1904.

To M. J. Bray, as Trustee of the Evansville Contract Company, in Bankruptcy:

Whereas, I am the owner by assignment of the following claims, which claims are duly proved in bankruptcy in the estate as above, before the Honorable George W. Johnson, Referee in Bankruptcy

for the Northern District of West Virginia, and, whereas, the same are established as preferred claims and payable out of the assets of said estate, first, after the costs of administration and before general claims shall be allowed to participate in any distribution, which said preference was established by decree of said referee under date of November 19th, 1904.

And, Whereas, the same are attached as collateral to a number of notes given to the City National Bank of Evansville, Indiana, by the undersigned.

Now, Therefore, I hereby direct and order you, after the payment of said notes in said City National Bank, to which said claims are attached as collateral security, to pay over to said City National Bank, in addition to the amount represented by my said notes, as aforesaid, one-half of the remainder of the amount of said claims which may be due and payable to me by reason of my ownership thereof, which half amounts at this day to about $4,500.00, it being understood that certain amounts advanced by M. J. Bray to said Philip W. Frey for the payment of the purchase price of some of the claims hereinafter mentioned shall also be first paid to said Bray together with the money due the City National Bank upon the notes aforesaid to which collateral is attached, before the order herein to pay the balance due me shall be effective.

131 The following is a list of said claims and the amounts due thereon:

L. Cramer & Son, Parkersburg, W. Va.	455.69
D. A. Bardin, Athens, O.	327.00
Duncan & Porter Co., Allegheny, Pa.	460.00
The Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59
The Monongahela River Consolidated Coal and Coke Co., Pittsburg, Penn.	4,582.98
C. D. Dotson, Parkersburg, W. Va.	2,084.08
C. C. Martin and Co., Parkersburg, W. Va.	371.15
The Variety Iron Works, Cleveland, O.	7,348.00
E. L. Oles.	148.20
Southeastern Lime and Cement Co.	2,806.00
Clydesdale Stone Company, Pittsburg, Pa.	6,185.35
Withers and Van Devender, Parkersburg, W. Va.	3,000.00
E. L. Neale, Ben Lomond, W. Va.	1,045.50
Lombard Iron Works, Augusta, Ga.	2,107.82

Executed in Duplicate.

PHILIP W. FREY.

A true copy—

ADOLPH F. DECKER,
Notary Public.

[OFFICIAL SEAL.]

FRANCIS J. REITZ, of lawful age, having been first duly sworn to tell the truth, the whole truth, and nothing else but the truth, deposes as follows:

Direct examination by Mr. J. A. DUPUY:

Q. 1. Mr. Reitz, you reside in the City of Evansville, Indiana?

A. I do, sir.

Q. 2. If you hold any official position in connection with any one of the local banks please state which bank and what position you hold?

A. I am president of the First National Bank in liquidation, and of the City National Bank.

Q. 3. You were holding these two positions in April of last year?

A. Yes, sir.

Q. 4. How long has the last named bank, the City National Bank, been in existence?

A. Since April, 1902; no, April, 1903, I think it is.

Q. 5. Does your connection with it as president date from its organization?

A. Yes, sir.

Q. 6. Mr. Reitz, was any loan negotiated in either of your banks—if so, state which one—in favor of Mrs. Laura Eichel for
132 the purpose of raising money with which she proposed to purchase claims against the estate of the Evansville Contract Company, bankrupt?

A. The City National Bank.

Q. 7. Was the loan made directly to Mrs. Eichel, in her name, on the books of your bank?

A. There was a proposition made there to loan money to Mrs. Eichel for the purpose of purchasing claims against the Evansville Contract Company.

Q. 8. What became of that proposition?

A. When the proposition was first made I rather opposed loaning the money and referred the matter to the Board of Directors, and in the discussion Mr. Bray said he regarded the loan as a good one, he knowing more about the affairs of the company than any other member of the board, and I said if the loan was a good one he would not object to guaranteeing it, and he said he would not, and I asked him if he would put his name on the paper and he said he would.

Q. 9. Tell us whether his name did appear upon that paper, in the event that the paper was negotiated in your bank?

To which question counsel for the Fidelity Company objects, on the ground that the same is incompetent.

A. My recollection is that as the claims were purchased they were accompanied by a draft on Mr. Phil. Frey and the drafts were paid and notes made and executed by Mr. Frey and Mr. Bray.

Q. 10. Did Mrs. Eichel's name appear on the books of your bank in connection with that loan at all?

A. I don't think it did; to the best of my recollection it did not.

Q. 11. Did, as a matter of fact, your bank advance or negotiate

this paper guaranteed by Mr. Bray for the purpose aforesaid, that is, of enabling Mrs. Eichel to buy claims?

A. That was the sole purpose of it.

Q. 12. Were there any reasons why this loan did not appear in the name of Mrs. Eichel that your bank would not object to disclosing?

A. No special reason at all that I know of. I might state here, if necessary, that as a general proposition we dislike to do business with women in the bank. As an illustration of it, when the City National Bank was organized we declined to let any woman take stock.

Q. 13. Can you give us some estimate of the extent of the money advanced on account of the loan aforesaid?

A. I cannot, because I don't keep up with such details of the bank.

Q. 14. I understand you to say awhile back that drafts were made upon Mr. Frey for this money, which were cashed at your bank; what evidence would or did you have that the money was
133 applied for the specific purpose of buying in these claims?

A. The claims were attached to the drafts.

Q. 15. When you paid those drafts who became the holder of the claims?

A. The City National Bank; we held them as collateral to the drafts, to the note executed by Mr. Frey and Mr. Bray.

Q. 16. I understand you to say that you cannot, from memory, give us approximately the extent of those drafts issued in payment of the claims?

A. No, I never allow myself to be annoyed with those details; I pass upon the loan, and then depend upon the cashier to carry out any agreement that is entered into.

Q. 17. What ultimately became of that loan?

A. My recollection is that Mr. Bray came in there and paid it off and took up the claims, the claims filed with the notes.

Q. 18. And your bank had held them as collateral for the payment of the notes?

A. Yes, sir.

Q. 19. Mr. Reitz, were you present in this city some time last April when Messrs. Martindale and Wood, the representatives of the United States Fidelity and Guaranty Company, were here and had an interview with a number of gentlemen? I think the date was the 12th of April.

A. Yes, sir.

Q. 20. How did you happen to attend that interview, Mr. Reitz?

A. At the request of Mr. Cunningham.

Q. 21. Before going further into that particular matter, I will ask you if the First National Bank of this City, or the City National Bank of this city, or both, are indemnitors upon a certain indemnity agreement which was executed by certain banks about the 12th day of April, 1904, to the United States Fidelity and Guaranty Company?

A. I think both the First National and the City National are.

Q. 22. It is stated in the deposition of Mr. Martindale, recently given in this case, and perhaps also in that of Mr. Wood, where they undertake to recite what took place at the conference in this city on the 12th of April, last, that when you appeared upon the scene you

brought with you a certain paper which you, however, did not show to them, but you stated that it was an indemnity agreement given by Mr. Bray to secure certain banks against loss by reason of their own indemnity to the United States Fidelity and Guaranty Company. Please say whether that statement is correct?

A. As near as I can remember I stated that we were not interested in it; that we had a guarantee from Mr. Bray indemnifying the bank.

Q. 23. In the affidavit made by Mr. Martindale, referring to your presence there, he said that you claimed to have an agreement executed by Madison J. Bray to the City National Bank to indemnify and save harmless the City National Bank against any loss
134 rising out of its indemnity agreement of the 4th of April, 1904; in his deposition given subsequent to that time, he says that you told him that the banks which had signed the guaranty to The United States Fidelity and Guaranty Company rested upon and relied upon that indemnity to them by Madison J. Bray. Did you make either one or both of those statements?

A. Mr. Martindale is mistaken as to that, we only had a guaranty as to the First National Bank, and that guaranty I had with me at that time. The City National Bank has no guaranty from Mr. Bray.

Q. 24. Then the statement in his affidavit that you said you had an indemnity to the City National Bank from Mr. Bray is not correct?

A. No, sir, as we have none from Mr. Bray.

Q. 25. Is the statement in his deposition, in which he says that you stated you had an indemnity from Mr. Bray given to all the banks, correct?

A. No, sir, it is not correct.

Counsel for the Fidelity Company objects to the foregoing questions upon the ground that they contain incorrect quotations.

Counsel for trustee now quotes as follows from the deposition of Mr. Martindale, beginning near the foot of page 6: "Mr. Reitz said the subject did not interest the bank for the reason that Madison J. Bray had executed to the banks a contract of indemnity by which he agreed to save them harmless on account of the guaranty which the banks had signed to the United States Fidelity and Guaranty Company. He had with him that contract of indemnity signed by Mr. Bray; it was read over carefully two or three times by Mr. Cunningham and Mr. Reitz in the presence of Mr. Wood and myself (not aloud) and its contents explained to Mr. Wood and myself. It was stated to us that the banks which had signed the guaranty to the United States Fidelity and Guaranty Company rested upon and relied upon that indemnity to them by Madison J. Bray and regarded Mr. Bray as amply good to cover the matter, and therefore they weren't interested in this matter at all."

Q. 26. I will now ask you, Mr. Reitz, whether the City National Bank ever had any indemnity executed to it by Mr. Bray, indemnifying it against loss by reason of its indemnity given to this United States Fidelity and Guaranty Company?

A. There was no indemnity from Mr. Bray whatever.

CLOSE IN CENTER

Q. 27. If you had any indemnity from Mr. Bray at all what bank, if any, did it indemnify?

A. The First National Bank in liquidation.

135 Q. 28. Can you tell us the circumstances under which that indemnity was asked for by the bank or given voluntarily by Mr. Bray?

A. Yes, sir.

COUNSEL FOR FIDELITY COMPANY: Evidence as to the indemnity agreement referred to is objected to unless the paper itself is produced as the best evidence.

Counsel for the trustee reply-s that evidence touching that matter was heretofore gone into and introduced in these depositions, and that witnesses are now being examined in rebuttal upon that subject.

A. continued. The reason and cause of getting that indemnity was that the First National Bank had accumulated some money which was being paid to the stockholders as accumulated; any time that we had enough to equal, say, a five per cent. dividend upon its capital stock; some of the directors made a suggestion that the First National Bank should declare—as we had accumulated at that time more than five per cent. of its capital stock—the suggestion was made by the directors that a dividend should be declared and paid to the stockholders. In view of the First National Bank having signed this indemnity to the Baltimore Surety Company, whose name I don't recall, I objected and gave as my reason that if this money should be paid out and the First National Bank should have to pay anything on account of having become guarantor on this bond of indemnity it would be quite difficult to collect back this money from the stockholders, and at the same time stated that if the bank would be indemnified against any loss on account of having signed this bond that I would be willing that a dividend should be declared and possibly at the same time I suggested that Mr. Bray knew more about the matter than anyone connected with the bank if he would agree to hold the bank harmless that I would be willing a dividend should be declared. My recollection is that Mr. Bray took the matter under consideration a few days, and possibly at some subsequent meeting he agreed to indemnify the First National Bank on account of having signed this bond, and then, having executed this agreement, we declared the dividend.

Q. 29. Was the First National Bank in liquidation at that time?

A. Yes, sir.

Q. 30. What connection, if any, had Mr. Bray with that bank?

A. He was one of its directors.

Q. 31. Was he a director of that bank at the time the bank gave the indemnity agreement to the United States Fidelity and Guaranty Company?

A. Yes, sir.

136 Q. 32. What part, if any, did he take in that matter?

A. He recommended that the bank should sign the indemnity bond, and upon his suggestion the bank signed the bond.

Q. 33. Do you know whether that fact entered into his consider-

ation at all when he was asked to indemnify the bank against its own indemnity?

Counsel for the Fidelity Company objects to the question upon the ground that it is clearly incompetent.

A. Very largely.

Q. 34. Have you in your possession, or in the possession of the bank, the indemnity of Mr. Bray which you have just referred to?

A. The Bank has it.

Q. 35. Would your bank object to having a copy of that filed with your deposition?

Mr. AMBLER. The Fidelity Company will not demand the filing of the original, but would like to see the original. A copy may be filed.

Q. 36. Will you, as president of that bank, comply with that request?

A. Yes, sir.

Q. 37. Make us a copy and then submit *it* to the attorney on the other side the original for comparison?

A. Yes, sir.

Q. 38. Mr. Reitz, did you refuse to show this paper we just spoke of now to Messrs. Martindale and Wood on the occasion they were here?

A. I don't think I was asked to show it.

Q. 39. As I understand it, it is a private paper of the bank?

A. Yes, sir.

Q. 40. Do you know whether Mr. Eichel was present in Evansville on the day that Messrs. Martindale and Wood were here?

A. Not that I know of.

Q. 41. To what extent were you present at this conference of the 12th of April, 1907; how long were you there?

A. Possibly altogether an hour.

Q. 42. It is stated in the depositions of Messrs. Martindale and Wood that during that conference Mr. Bray took the position that there was no liability resting upon the several banks who had given the indemnity agreement to The United States Fidelity and Guaranty Company. What is your recollection on that point?

A. I have no recollection that he took any such position; on the other hand, with me he took the position that the banks were liable, and said whether they were legally liable or not they ought to pay if a judgment or decree was found against them.

137 Q. 43. Was that opinion expressed to you at any time that you can recall?

A. Yes, sir; on our way from Mr. Cunningham's office to the bank he said that much to me, in so many words.

Objected to as incompetent by the attorney for the Fidelity Company because when once a decree is given against the banks the moral question would be out of it.

Q. 44. You refer to that opinion expressed to you on that day

by Mr. Bray, and Messrs. Martindale and Wood referred to what they said was a different opinion on that day. Do you recall any further expressions of opinion on that question of law by Mr. Bray at any other time?

To which question the attorney for the Fidelity Company objects, on the ground that the same is incompetent and improper.

A. He always took the position with me that the banks were morally if not legally responsible upon that indemnity bond.

Q. 45. These two witnesses Martindale and Wood further state in their depositions that at the interview above referred to Mr. Bray stated that he had consulted counsel upon that point and that he had been advised that the indemnity agreement was a nullity. Does that refresh your memory?

A. I have no recollection of him making any such statement.

Q. 46. Do you recall a statement made to the effect that Mr. Bray had consulted Mr. Frey upon that point, and that Mr. Frey had so advised him?

A. I have no recollection of him making that statement, and am rather inclined to think Mr. Cunningham made that statement, that Mr. Frey held the banks were not liable and that he himself hadn't gone into the question far enough to express any opinion.

Q. 47. It was suggested by a question asked these witnesses by Mr. Ambler that Mr. Bray possibly had stated to what extent he had paid Mr. Frey out of the funds of this bankrupt for that opinion adverse to The United States Fidelity and Guaranty Company. Do you recall any remarks of Mr. Bray, or Mr. Frey, or Mr. Cunningham on that occasion to that effect?

A. I don't think that question was at all raised, except in so far as Mr. Wood continually argued that the matter ought to be settled and compromised, as the funds were being wasted in court costs and attorney's fees.

Q. 48. What reply, if any, did Mr. Bray make to that suggestion?

A. He said he did not think that that was the proper time
138 to enter into any compromise until the referee would make some decision, and he did not care which way the referee would decide, just so he would make some decision, and after his decision he would do all he could to compromise and settle the matter.

Q. 49. What, if anything, was there said with reference to Mr. Bray's possible ownership of claims against the bankrupt estate?

A. I think Mr. Wood said to him, "Then you are the owner of these claims?" I think Mr. Bray replied in so far that he had advanced the money to buy them, pay the compromise.

Q. 50. What compromise do you refer to?

A. I don't mean the compromise; I mean the purchase price of the claims.

Q. 51. Do you recall his exact language upon the question of advancing or raising the money to purchase these claims, and for whom it was raised, that is, for whose benefit?

A. As I stated, Mr. Wood kept putting the question to him, "Then

you are the owner of these claims?" and Mr. Bray replied that he was probably the owner in that way, that he had advanced the money for the purchase of the claims and held them as collateral security.

Q. 52. I believe you just stated that your bank advanced the money, but Mr. Bray subsequently paid the bank and took the claims.

A. As the claims were purchased, as I stated before, they were accompanied by a draft, and we paid the drafts and then took the notes, as I remember, from Mr. Frey and Mr. Bray, guaranteed by Mr. Bray, and for some time we held them in that shape, and then subsequently Mr. Bray came in and paid the notes and took the claims.

Q. 53. And I understand you to say the claims were attached to the notes as collateral security?

A. Yes, sir, that is what I stated.

Q. 54. What, if anything, was said at that conference, with reference to the prosecution of a suit in Pittsburgh in the name of Laura Eichel against the United States Fidelity and Guaranty Company, and as regards Mr. Bray's attitude in that suit?

A. Mr. Wood made the assertion to Mr. Bray that he was behind the suits in Pittsburgh, and my recollection is that Mr. Bray said, "I don't know whether I am or not; I am a kind of a Poobah in this matter;" he used that term.

Q. 55. How long have you lived in Evansville, Mr. Reitz?

A. All my life.

Q. 56. How long have you known Mr. Bray?

A. Since I were a boy.

Q. 57. How long had Mr. Bray been connected officially with the First National Bank, now in liquidation, to which he gave this indemnity?

A. He and I became directors of the bank at the same time;
139 that must have been away along in the seventies.

Cross-examination by Mr. AMBLER:

X Q. 58. Did the City National Bank succeed the First National Bank in any sense?

A. Yes, sir.

X Q. 59. Was not the continuation of the business of the First National Bank carried on by the City National Bank to a certain extent, in the sense of taking over its good will and officers and organization?

A. Its good will and officers; not as to its organization; its organization was entirely different.

X Q. 60. I beg to call to your attention that the indemnity agreement shows the City National Bank as a creditor for five thousand dollars and the First National Bank as a creditor for twenty-four thousand dollars; I am speaking of the indemnity agreement of April, 1904. Do you remember, roundly, whether those are the respective amounts?

A. They are about correct.

X Q. 61. What indemnity, if any, has the City National Bank on account of going upon that paper of April, 1904?

A. The City National Bank.

X Q. 62. Yes, sir.

A. None that I know of, unless it possibly be that in a compromise that the First National Bank made with Jacob Eichel he may have indemnified the City National Bank against any loss on account of having signed this indemnity bond; I am not positive about that, but I have a vague recollection that that is one of the terms of that compromise.

X Q. 63. To refresh your recollection—and I do so with entire respect—did you not say, on April 12, 1907, that the two banks represented by you did not feel that they were interested in the suits, on account of the indemnity given to them?

A. I don't think so; I think Mr. Martindale used the plural word instead of the singular.

X Q. 64. When was the adjustment made with Mr. Eichel?

A. I don't remember the date, but it was not so very long ago.

X Q. 65. Was it since April, 1907?

A. I couldn't answer that question; I never charge my memory with any of the details; I depend upon others for that; I only direct the bank's general policy.

X Q. 66. I am asking with reference to the interview of April 12, 1907, do you not recall if there had been some arrangement made to indemnify the City National Bank prior to that date of April 12, 1907?

A. The City National Bank? No, sir, as at no time did I rely upon any indemnity excepting the one made by Mr. Bray.

140 X Q. 67. Have you any paper of document that will show what was the adjustment and compromise made with Jacob Eichel which you referred to a while ago as compromising an indemnity of the City National Bank?

A. I can answer that question by saying that only upon examinatino will I be able to state, as I have no distinct recollection as to that.

X Q. 68. I assume that you were aware that proceedings had been taken by the company at Parkersburg to try and get this question adjusted and try and have these indemnitor banks protect the company?

A. I was not; I was aware that there was a lot of litigation going on, but what it was about I could not say.

X Q. 69. About what time did this plan commence of your bank paying drafts made on Mr. Philip W. Frey, with claims attached?

A. I have no recollection as to that, only except as to the time the claims were purchased.

X Q. 70. I suppose you have no recollection of amounts either?

A. No, sir, that is a matter that doesn't come under my supervision at all.

X Q. 71. You say that in some way Mr. Bray became liable for the amounts that were paid on these drafts made on Mr. Frey. Do

you, of your own knowledge, know in what shape Mr. Bray did make himself liable for those drafts?

A. By signing notes for the purchase of the claims, the amount of the purchase of the claims; when drafts were made on Mr. Frey with the claims attached notes were made by Mr. Frey jointly with Mr. Bray to take up these drafts; that is my recollection of it. As I stated before, I am not familiar with the details of that.

X Q. 72. You don't know when that commenced, or how long it continued, or the amount in the aggregate?

A. No, sir; the papers themselves will show that.

Mr. AMBLER: The last answer of the witness properly suggests that the papers are the only evidence material.

Mr. REITZ: I don't say that it is the only evidence, but so far as I am concerned it is.

X Q. 73. You say that the First National Bank signed this agreement to indemnify the Fidelity Company at the suggestion of Mr. Bray. Do you know at whose suggestion the City National Bank signed?

A. Upon the same suggestion and recommendation of Mr. Bray; it was all one transaction.

141 X Q. 74. All signed at the same time?

A. Yes, sir.

X Q. 75. Do you remember how, when and in what amount Mr. Bray took up those several notes that had been signed by himself and Mr. Bray, to which you referred?

A. No, sir; that is a matter that doesn't come under my immediate supervision.

X Q. 76. Do you know anything about that except what was told you by somebody else?

A. I know as an officer of the bank that it was done, but how and when it was done I do not know, because I never charge myself with matters of that kind connected with the bank, as I am not a clerk in the bank.

X Q. 77. I do not question that you are stating correctly your understanding of the situation, but isn't it a fact that you are actually ignorant of the amount of money paid by Mr. Bray and of the date that was done, and the shape in which it was done?

A. Personally, no. I wouldn't say that I know it was done, but I know Mr. Bray raised the money outside of the bank to be the fact. I know that, but as to details I do not know, because I don't allow myself to be annoyed with details in the management of the bank. I of course know when loans are being made and when loans are being paid.

X Q. 78. I suppose, with your long acquaintance with Mr. Bray and your long association with him in the banking business, and your knowledge of his affairs, that you knew exactly whom you were trusting when you agreed to advance money on his note jointly with Mr. Frey, didn't you?

A. I always regarded Mr. Bray as amply good for anything he put his name to.

X Q. 79. You regarded those notes as perfectly good upon Mr. Bray's security?

A. Yes, sir; I regard any note Mr. Bray signs as being perfectly good.

X Q. 80. And whether he proposes to use the money to advance the fortune of the ladies—with whom you will not deal—or for any other purpose, would not be a question with you?

A. No, sir. I regard any note he would sign as good.

X Q. 81. Mr. Bray is also a director in the City National Bank, isn't he?

A. Yes, sir.

X Q. 82. Have you any connection with the Citizens National Bank?

A. No, sir.

X Q. 83. You had no transaction at all in this matter with Mrs. Laura Eichel personally?

A. No, sir.

Redirect examination by Mr. DUPUY:

R. D. Q. 84. Mr. Reitz, as I gather from your deposition at large, the First National Bank, at the time it suggested to Mr. Bray, the desirability of having some indemnity against its
142 own indemnity to The United States Fidelity and Guaranty Company, as a precautionary step taken prior to making any disbursements of its assets among its stockholders, it was a suggestion of your own, was it?

A. Yes, sir; I made the suggestion to Mr. Bray—before declaring a dividend of its assets—that he knew more about the affairs of the Evansville Contract Company than any other member of the board—he said there would be no loss—and I asked him to guarantee the bank against any loss, and, as I stated, after a day, or two, or three, he made the guarantee.

R. D. Q. 85. I will ask you this question. During the progress of the administration of the estate of this bankrupt, to what extent, if at all, has Mr. Bray become guarantor in your bank for funds to be used by the trustees in the administration of this estate?

A. It is my recollection that possibly we loaned money to the trustees in the progress of the work, but I have no recollection that he became personally responsible to us for that; we relied upon the fact that any debts the trustees would create as trustees would be a preferred lien against its assets.

R. D. Q. 86. Do you recall any overdrafts on your bank by the trustees?

A. Overdrafts of their accounts? Yes, sir, and as to that I think we have Mr. Bray's word that these will be made good, but we never had anything in writing to my recollection.

R. D. Q. 87. By Mr. Bray's word do you mean Mr. Bray as trustee or Mr. Bray individually?

A. Both; we relied upon him that any draft we would pay, any check overdraft of their account, that he would see that it was made good.

R. D. Q. 88. To that extent did you regard him as personally responsible to your bank?

A. Yes, sir, we took his word for it and relied upon his word that he would make good any overdraft of that account.

R. D. Q. 89. Can you recall to what extent, if at all, such overdrafts were made?

A. No, sir.

R. D. Q. 90. Do you recall that they were made?

A. I think so, yes, sir.

Recross-examination by Mr. AMBLER:

R. X. Q. 91. When the matter of giving an indemnity to The United States Fidelity and Guaranty Company by these banks was presented to you by Mr. Bray do you remember what he said about danger of going on that paper?

A. He didn't regard it as any danger at all at the time.

R. X. Q. 92. And therefore recommended that both the City National Bank and the First National Bank sign the indemnity without any guaranty to them?

143 A. Yes, sir; that question was not raised at that time. It was only raised when some of the directors asked that some of the funds that had accumulated up to that time be disbursed to the stockholders.

R. X Q. 93. Do you remember that this guaranty was given by Mr. Bray to the First National Bank before it signed this paper of April, 1904, or whether it was given afterwards?

A. Signed which paper?

R. X Q. 94. My question is whether Mr. Bray guaranteed the First National Bank against loss on that paper of indemnity before or after the bank had signed it?

A. Certainly after it was signed, because it has been signed for some time before that, probably a year or two.

R. X Q. 95. Do you remember in that connection that Mr. Bray told you at the time your banks were asked to sign the paper of indemnity that the trustees would pay out in full all liability on account of the bonds of the Fidelity Company?

A. He evidently was under that impression, that they would pay out in full, and for that reason he recommended the banks executing the guaranty on the bond.

R. X Q. 96. Don't you remember in that connection that he said to you that there were some labor claims and material claims that were to be paid by the trustees?

A. He said in a general way that there were preferred claims there.

(Signed) FRANCIS J. REITZ.

EXHIBIT "A." REITZ.

In consideration of the payment of one dollar ($1) receipt of which is hereby acknowledged, and in further consideration of the fact that the First National Bank of Evansville, Indiana, did as-

sign, sell (without recourse), transfer and set over unto Jake Eichel all its right, interest, claim and demand in and to certain notes against the Evansville Contract Company as referred to in an article of agreement (a copy of which is hereto attached).

I, the undersigned, hereby agree that I will protect, indemnify and save harmless the said First National Bank of Evansville, Indiana, against all loss, damages, and liability of any kind that they have assumed or shall hereafter incur by reason of the execution of a bond to the United States Fidelity and Guaranty Company in the sum of seventy-five thousand dollars ($75,000), bearing date of April 4, 1904.

Witness my hand and seal.

M. J. BRAY.

144 Witness:
F. A. FOSTER.

A true copy—
[OFFICIAL SEAL.] ADOLPH F. DECKER,
Notary Public.

A true copy—

_____,
Notary Public.

145 (PAGE 2. EXHIBIT "A"—REITZ.)

This agreement made this 3rd day of November, 1906, between The First National Bank, The Citizens National Bank, and Madison J. Bray, of Evansville, Indiana, parties of the first part, and Jacob Eichel, of said city, party of the second part, Witnesseth:

The parties of the first part hereby agree to sell, transfer and assign to the party of the second part the respective judgments rendered in favor of each against John G. Eigenmann and The Evansville Contract Company, in the Gibson Circuit Court, on the 20th day of August, 1906, and also the judgment rendered in their favor jointly against Louis P. Eigenmann, together with all of their right, title and interest in and to the judgment and decree rendered in said court in a cause therein pending wherein the parties of the first part were plaintiffs and the Evansville Contract Company, John G. Eigenmann, and others, were defendants, in consideration of the sum of fourteen thousand dollars ($14,000.00) cash to be paid by the party of the second part at the date of the execution of this agreement, and to be divided among the parties of the first part pro rata, according to the amounts of their respective several judgments.

The parties of the first part also agree that they will assign to the party of the second part their several claims filed against said Evansville Contract Company, now in bankruptcy, and to execute all such proper transfers and assignments of such judgments and said claims as shall be necessary to vest title thereto in the party of the second part.

The parties of the first part also agree to transfer and assign to the party of the second part their several judgments rendered in the

Superior Court of Vanderburgh County against William Eichel on the same notes on which the judgment against said John G. Eigenmann and The Evansville Contract Company were rendered, in consideration of the execution by the party of the second part to each of the parties of the first part of his note at one year, with six per cent. (6%) interest, for ten per cent. (10%) of the principal of their respective claims.

In further consideration whereof the party of the second part agrees that he will protect, indemnify and save harmless the parties of the first part and each of them against all loss, damages and liability—of every kind that they or either of them have assumed or shall hereafter incur by reason of the execution of a bond to
146 The United States Fidelity and Guaranty Company in the sum of seventy-five thousand dollars ($75,000.00), bearing date April 4, 1904, said Eichel is to pay and protect parties of the first part against liability for costs accrued and to accrue in any of said proceedings.

In witness whereof the said banks have caused these presents to be executed in their respective names by their respective presidents, and the other parties hereto have hereunto set their hands and seals, this the day and year first above written.

THE FIRST NATIONAL BANK OF EVANSVILLE, INDIANA,
By FRANCIS J. RITZ, *President.*
THE CITIZENS NATIONAL BANK OF EVANSVILLE, INDIANA.
By S. P. GILLETT, *President.*
MADISON J. BRAY.
J. EICHEL.

A True Copy.
ADOLPH F. DEEKER,
Notary Public.

PHILIP W. FREY, of lawful age, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes as follows:

Direct examination by Mr. DUFFY:

Q. 1. Are you not the Philip W. Frey, attorney at law, whose name appears in the record here?

A. I am.

Q. 2. Mr. Frey, were you in the City of Evansville on the 12th day of last April?

A. I can't say as to that.

Q. 3. Were you in the city on the day Messrs. Martindale and Wood, representatives of The United States Fidelity and Guaranty Company, were here to have a conference with parties in regard to matters connected with the estate of The Evansville Contract Company?

A. I am not advised now whether I was in Evansville; I am certain I was not present at the conference in Mr. Cunningham's office

at which were present, as is alleged, Messrs. Wood and Martindale, nor did I take any part in anything about which they testify, but I may have met Mr. Wood or Mr. Martindale or both on the street after that conference, I am not sure about that; I know them both.

Q. 4. Mr. Frey, in the deposition recently given in this matter by Messrs. Wood and Martindale in which they undertake to recite what took place at a conference they had here on the 12th of April, last, your name has been brought into the matter several times, and once in connection with what is said to have been some opinion that you were called upon to give to Mr. Bray touching the validity of an indemnity agreement executed on the part of various banks on the 4th of April, 1904, to The United States Fidelity and Guaranty Company. Will you please state whether you were employed for any such opinion, or gave any opinion touching the validity of that agreement?

A. I never was and I never did. I want to qualify that by saying this. Perhaps in the presence and hearing of attorneys or
147 bankers interested in this question I may have casually said that as a general principal an undertaking of that kind by a national bank was in my judgment ultra vires, unless qualified in some way by some other principle of law arising out of the combination of circumstances, but I had never examined the question with a view to giving a legal opinion, never had been asked to, and certainly not by Mr. Bray as trustee.

Q. 5. The question was asked these gentlemen, one or more of them, what portion of this trust estate had been expended by Mr. Bray in obtaining your legal services to the extent of giving him an opinion upon that question; I presume from your former question what your answer will be now, but please give it to me.

A. Not one cent was paid me by Mr. Bray, or any of the trustees or anybody else, for any opinion or advice upon that proposition.

Q. 6. In the deposition of Mr. Martindale recently given at Parkersburg in this matter he stated that at the meeting here on the 12th of last April, Mr. Cunningham stated that he had recently been called into your office and consulted with reference to being employed to assist you in prosecuting certain claims upon which suits had been filed in Pittsburg, Pennsylvania, in the interests of Mrs. Eichel and Bray, what, if anything, do you know about that?

A. I should say that Mr. Cunningham is very naturally mistaken about that, that he has forgotten what our conversation was. Mr Cunningham was never approached by me or anyone else in my office so far as I know with reference to the prosecution of suits in Pittsburg, because I have had nothing to do with those suits; they have been in the hands of other counsel and I have never had any connection with the suits except that occasionally when an affidavit had to be made by Mrs. Eichel it was sent by Mr. Eichel to me for the purpose of having Mrs. Eichel execute that affidavit. The conversation that Mr. Cunningham evidently has in mind is this: At a time when some sort of a demand was made by The United States Fidelity and Guaranty Company of Baltimore to require

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these banks here to make certain defenses for Mrs. Eichel I consulted with Mr. Cunningham about undertaking the defense of the banks, because Mr. Eichel was undertaking to save the banks harmless on this indemnity if there was any liability, but Mr. Cunningham never had any conversation with me about those Pittsburg suits because I could have had none with him, I having had nothing to do with them, and I don't even know the men—except by correspondence—who brought the suits. Cunningham has evidently gotten confused about the many lateral ramifications of this case and the further fact that he and I have a great deal of business together, and I can understand how his memory
148 is defective on that point; and on the other hand it couldn't be possible that I talked to him about these Pittsburg suits because I am not concerned with them.

Q. 7. Will you in this connection, Mr. Frey, state whether Mr. Bray, as an individual or otherwise, has sought your professional services touching that litigation of Laura J. Eichel, pending in Pittsburg, against The United States Fidelity and Guaranty Company?

A. He has not.

Q. 8. I believe you are no longer attorney for Mr. Bray as trustee of the bankrupt estate?

A. I haven't been for some time.

Q. 9. Give us, approximately, the time when your relations as attorney for the trustees ceased?

A. I cannot from memory, but it is over a year, possibly a year and a half, except that some unfinished matters connected with the trusteeship were just recently disposed of; for instance, suits pending in the trustee's name in this jurisdiction or in this part of the State, long since adjusted, were dismissed by me within the past few days, but my services were paid for and since that I have had nothing to do with the trusteeship.

Q. 10. Mr. Frey, in the depositions of Messrs. Martindale and Wood, they make certain statements purporting to come from Mr. Bray which they say convinced them that Mr. Bray, in using those expressions, showed that he was the owner of a number of the claims against the bankrupt estate. Will you please state what personal knowledge you have in regard to the purchase of those claims from money raised on a loan in bank in this city, and by whom was the purchase made?

A. Yes, sir. The first time that purchase was ever suggested was by myself, in the Chancellor Hotel, at Parkersburg, while Mr. Bray, Mr. Eichel and myself were at supper. It was in the early steps of this litigation and I suggested—after Mr. Eichel had told me that various parties holding claims had come to him suggesting that he buy them at a discount—and he having stated that he was unable to do so because he hadn't the money and couldn't raise the money I suggested that if he would advise his wife, Mrs. Eichel, to buy those claims that I would undertake to buy them for her account, and I suggested the method in which it should be done, and I turned to Mr. Bray and asked him, at that same supper table,

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whether, if I bought those claims for Mrs. Eichel and attached them as collateral to the note, whether he would help me raise the money or help Mrs. Eichel raise the money, my purpose being to buy them for Mrs. Eichel. Whether it was determined at that particular interview that he would do so or not I am not now able to say; some time after that he agreed that he would go on my
149 note to buy those claims for Mrs. Eichel, but at that time there were only a few of them in discussion, the whole amount of the claims was not then contemplated and in fact I think before Mr. Bray ever agreed to become my surety I, on my own responsibility, bought one of those claims, one or more, I have forgotten now, made arrangements at the Citizens National Bank to honor my draft and thereafter take my note with the claim itself attached as collateral, which was done and which note I still owe, and which note has attached to it the collateral which was bought, and upon which note Mrs. Eichel has from the day it was made paid the interest. Thereafter Mr. Eichel, negotiating for his wife, would purchase claims, notifying me that he had done so, made draft on me, drafts would come with the claims assigned, subject to my approval, I would examine the claims, see that they were properly proved and properly assigned, usually go down to the City National Bank and advise the cashier or somebody else there that I would make a check that day on that bank, advise Mr. Bray, they would honor my check, I would take up the draft and claim, take it down to the bank make a note and notify Mr. Bray to go over there and sign his name under mine; afterwards, there being a variety and number of notes, I signed one note covering the whole amount and all the claims were attached as collateral to that note and Mr. Bray signed under my name.

Counsel for the Fidelity objects to references as to the contents of papers, none of which are produced, and no dates, amounts, or other particulars given by which the same can be identified.

Q. 11. Mr. Frey, the notes which you say Mr. Bray signed for the purpose of raising money with which to buy those claims for Mrs. Eichel were negotiated at what bank?

A. The notes were negotiated at the City National Bank, but the drafts of which I spoke came through various banks and were paid for by my check on the City National Bank.

Q. 12. You being familiar with the details of that transaction, tell us to what extent, if at all, Mr. Bray, under the arrangement you have just described, became the purchaser or owner of those claims?

A. To my knowledge none whatever as owner. He had the right to subject that collateral to the payment of the note first; he was the surety for Mrs. Eichel and myself, although Mrs. Eichel's name perhaps did not appear on the paper at all times.

Q. 13. How did you come to act for Mrs. Eichel in this matter?

A. Well, my relations with Mr. and Mrs. Eichel for many
150 many years, in fact, since I was a child, have been of the most intimate, aside from having been Mr. and Mrs. Eichel's

attorney for a great many years Mrs. Eichel is on the border line of relationship to me, kin, not blood kin, but at the time of these negotiations her brother was a member of my household and her brother and myself married sisters, and we were very close, both socially and in a business way, and I felt that her separate estate was largely involved in the fortunes of her husband.

Q. 14. It has been stated by the president of the City National Bank that those notes, given in the manner you have just described, for the purpose described, have some time back been taken up out of that bank by Mr. Bray; you know that to be a fact, do you?

A. Yes, sir, I know that I got no more notices of their maturity, and they never forget those.

Q. 15. The claims, as it has been stated—I will ask you what is your knowledge upon that point—went along attached to the notes as collateral security to the notes; is that a fact?

A. They were always that way; of course I don't know physically where they are now, but so long as I had any connection with them they were attached as collateral to the notes upon which the bank had the first claim, it having advanced the money.

Q. 16. Under the arrangement you have described Mr. Bray's rights in the matter were those of an indorser as distinguished from an owner of the claims?

A. He was the surety; he never was the owner that I know of.

Q. 17. If you recall any other fact connected with this matter that I have omitted to ask you I would be glad if you would state it?

A. I do not.

Cross-examination by Mr. AMBLER:

X Q. 18. I suppose, Mr Frey, you have read the depositions of Mr. Martindale and Mr. Wood, to which counsel have referred?

A. I read them casually last Sunday morning at the club; not entirely; I haven't had time to read them since but I gathered generally from the general reading of them what was in them.

X Q. 19. You were counsel for The Evansville Contract Company at the time it was adjudicated a bankrupt?

A. I was.

X Q. 20. And you had been such counsel, for some time prior to that?

A. No, the Evansville Contract Company, when it was here, had a variety of counsel; I think the first time that I really became counsel for The Evansville Contract Company was when they got into that financial difficulty; that is my recollection.

151 X Q. 21. Can you tell us when it was, with reference to the adjudication in bankruptcy in February, 1901, that you had this conference with Mr. Eichel and Mr. Bray with regard to the buying up of claims against the company?

A. I cannot, except relatively. You will remember, Mr. Ambler, the number of times I went to Parkersburg; it was some time after it had been discovered that there would be considerable delay in winding up the bankrupt's estate, and it was on one of my visits to Parkersburg, at a time, it seems to me, when Mr. Eichel was telling

Mr. Bray and me that certain of the so-called preferred creditors were begging him to buy their claims from them, that is as near as I can fix the time; I remember the place to be as I stated.

X Q. 22. Do you remember how long it was after that conversation between you and Mr. Eichel and Mr. Bray before you commenced to buy any of those claims?

A. I think it was a considerable time, because I remember now that I came home and I think made personal arrangements for the purpose indicated with the Citizens National Bank, my own bank.

X Q. 23. You spoke of having bought one or two claims on your own account before any arrangement was made whereby Mr. Bray was to become surety or guarantor on notes given by you to raise funds; could you please tell us the names of the original owners of those claims bought by you?

A. I could not, unless I went to the bank or to my office.

X Q. 24. I show you a list of the parties claiming for labor and material under the adjudication of November, 1904——

A. That list wouldn't do me any good, Mr. Ambler, because I have seen all those names; my belief is from my memory, that the Pittsburg Trolley Pole Company is one of them, and I am not sure whether Nicolette Brothers is the other one; I think those are the two; I know I got notice regularly of the maturity of the interest on that one, the Pittsburg Trolley Pole Company.

X Q. 25. Well, as the interest has been running for some time, can you give us some idea of the amount of the claim, or what you paid for it?

A. I could not from memory.

X Q. 26. Could you give us the date of the transaction?

A. Not from memory.

X Q. 27. Could you from any memorandum book, or notation, or scrap in your possession or in your brain, give us a statement to show when it was, to be filed as a part of your deposition?

A. I couldn't without going to my office and making a search; about the only way I could get it would be to go to my letter impression book and see when I wrote Mr. Eichel; when I accepted a draft I telephoned to Mrs. Eichel or wrote her, and I don't know whether I have any memorandum or not.

X Q. 28. Do you know whether that claim was bought on a draft made on you by Mr. Eichel?

A. It was bought on a draft made on me by the owner of the claim.

X Q. 29. Were any of those claims bought on drafts made on you by Mr. Eichel with the claims attached?

A. I do not remember as to that.

X Q. 30. I understood you to say so earlier in your examination.

A. I do not remember, but I know Mr. Eichel negotiated
152 with these people and directed them to make draft on me.

X Q. 31. I understood you to say Mr. Eichel bought the claims and drew on you and you paid them.

A. Perhaps I did; I don't know whether I did or not, but I know that he made the negotiations for the purchase of the claims.

X Q. 32. Referring now to the original purchases made you as stated, to whom were those claims assigned.

A. To me.

X Q. 33. Where are those claims now?

A. I assigned them to the bank where I borrowed the money and I think that when they were taken up they were assigned to Mrs. Eichel, who is now the owner of them, as I understand it.

X Q. 34. Do you remember a very large batch of claims on which assignments, as I recall, appear to have been made by you to Mrs. Eichel, either personally or under some power of attorney, a year ago, and filed in the bankrupt court?

A. I remember something of that kind.

X Q. 35. Were those claims amongst them?

A. I think so, yes, sir.

X Q. 36. In order to get the facts together, would it be proper to say that you agreed that you would buy claims on drafts made on you, and that Mr. Bray should become surety to the bank for the amount of such purchase money, and that you took the title to the claims in yourself?

A. That would be partly true; Mr. Bray never at any time agreed to that at that first conversation, and really it wasn't contemplated by me after I had got into the negotiations to ever ask Mr. Bray to do it, but it got too large for me to swing along.

X Q. 37. Now, the claims that you did take up on your own initiative, and before you made any arrangements with Mr. Bray for suretyship, all of them were of the class known as preferred claims, were they not?

A. So-called, yes, sir.

X Q. 38. When you use the term so-called, do you not mean that these claims were so-called because they represented material or labor furnished in the prosecution of the work?

A. Yes, sir.

X Q. 39. Do you not mean such claims as were supposed to have right of recourse on the Fidelity Company?

A. Yes, sir.

X Q. 40. Were they not known as preferred claims because they were supposed to have that advantage?

A. They were called that by all of us, but up there at Parkersburg, in discussing them, we all agreed it was a misnomer.

X Q. 41. Mr. Frey, do you remember being in Parkersburg, probably within six months ago, when the deposition was taken by me of Mr. Charles F. Wood relating to certain letters that had
153 passed between you and him with relation to the claims that were authorized to be paid out of the funds in the hands of the trustee?

A. I believe I was; I am not sure about that.

X Q. 42. To refresh your recollection, do you not remember being in my office, I think last spring, when Mr. Eichel was present and Mr. H. P. Kenton was there on behalf of Mr. Bray, and I was attempting to prove the contents of some letters?

A. Yes, I remember it distinctly now; I was there just an hour and caught the west-bound train.

X Q. 43. Did you go to Pittsburg from there?

A. I did not; but wait a minute; I looked for the best way to go home; I believe I did go to Pittsburg.

X Q. 44. Has it come to your knowledge, from your intimate association with Mr. or Mrs. Eichel, or otherwise, that the several claims purchased by you and for which you made assignments to Mrs. Eichel, have gone into the hands of Messrs. Hall and Metcalf, attorneys at law at Pittsburg, and are now being sued against the Fidelity Company?

A. Partly by hearsay and partly by inference; the hearsay because I have been told so and the inference is because Hall & Metcalf sent to me complaints to be sworn to and I had Mrs. Eichel swear to them.

X Q. 45. About what time was it that one large note was used to fund all of those prior notes or obligations which you and Mr. Bray gave for the buying of those claims.

A. I have absolutely no recollection of dates; I could not tell you within a year.

X Q. 46. Could you come within a few scores of thousands of dollars as to the amount of the notes?

A. I could do that; it is less than thirty thousand and more than ten thousand dollars.

X Q. 47. Is there any way that you can give us that information if you would take the time to think about it or inquire?

A. No, sir, I couldn't charge my mind with that; I *I* am a busy man, I have no partner, everything I do I do myself, and I couldn't begin to give you dates or amounts, as I kept no record of it after it was over.

X Q. 48. I appreciate, Mr. Frey, as a lawyer and as a gentleman, that it is disagreeable to press these matters, but you have been put upon the witness stand to prove certain facts and I want to see whether you are testifying upon knowledge or upon ignorance, and I am seeking to draw that line. Will you please now, before the close of these depositions, by some reference to the books of the banks or other notations, about the time, and about the amount, and about the language of the note that was used by you and Mr. Bray
154 to fund the several obligations in the Citizens Bank that covered those claims you were buying?

A. Mr. Bray, in the first place, my recollection is, had nothing to do with the Citizens claim.

X Q. 49. The City, I meant to say.

A. The City Bank note was upon one of the usual forms of that bank, for the payment of a certain amount of money, without relief from valuation or appraisement laws, with interest at a certain per cent. from maturity, and attorney's fees; the amount I can get from Mr. Bray, who is here; if you want me to get it from him I will do so.

Mr. AMBLER: Perfectly willing.

Mr. FREY: Mr. Bray, what was the amount of that note?

Mr. BRAY: Do you mean the big note?

Mr. FREY: Yes, sir.

Mr. BRAY: It is about twenty-seven thousand dollars.

Mr. FREY: I having asked Mr. Bray am confirmed in my first statement that it was less than thirty thousand and more than ten thousand dollars; it was between twenty-seven and twenty-eight thousand dollars.

Mr. BRAY: I think it was twenty-seven thousand and thirty-seven dollars.

Mr. FREY: My impression, if left to myself, would have been about twenty-eight thousand dollars.

Mr. AMBLER: About the date, please?

Mr. FREY: What was the date of that note, Mr. Bray?

Mr. BRAY: Some time in May.

Mr. FREY: What year?

Mr. BRAY: 1906.

Mr. FREY: I adopt Mr. Bray's recollection of it.

Mr. BRAY: I have the original and everything connected with it.

155 X Q. 50. Mr Frey, were you counsel for Mr. Jacob Eichel under the proceedings in bankruptcy in Indiana wherein he was adjudicated a bankrupt in September, 1904?

A. I was.

X Q. 51. Do you recall that he was discharged in February, 1905?

A. I recall that he was discharged, but I couldn't begin to give you the date; I have had probably a hundred discharged in the last year.

X Q. 52. Do you recall whether you commenced to buy those claims before or after Mr. Jacob Eichel was discharged?

A. I don't know about that, but I should say before; that is my guess.

X Q. 53. Do you remember whether this note for about twenty-eight thousand dollars, representing claims that were bought by you and Mr. Bray, or through your agency, covered what we know as the preferred claims or not?

A. I think it did; I think it covered those claims which were for labor and material, which we discussed a little while back in this deposition.

X Q. 54. I think you have stated that at the time drafts were made on you you made some examination as to the nature and proofs of the claims. Did you not do that with special reference to ascertain whether or not they belonged to the class of preferred?

A. No, sir, I did not; on the contrary, I failed to pay a draft or refused to pay a draft on one, or perhaps more, simply because they were not proved according to the acts of Congress, and I think in one case where the assignment wasn't to my notion I sent it back for correction.

X Q. 55. The claims you were buying were preferred?

A. Mostly; although I think, all except one; I have a distinct recollection of having made up my mind that under the decisions one of them was not.

X Q. 56. Could you tell which one of those preferred claims it was you refused to buy?

A. I didn't say that; I bought all that Mr. Eichel negotiated for.

X Q. 57. Do you recall the one that you had the doubt about?

A. Yes, I think there was a question at one time as to whether coal was material; I think I spent a little time investigating that question; I am not satisfied yet, as I find it both ways.

X Q. 58. I cannot take the matter in shorthand and did not catch what you said about a demand made by the Fidelity Company on the banks, about which you spoke to Mr. Cunningham. Will you please explain that?

A. My recollection isn't very clear about what that was; there was some sort of a letter written here, maybe by yourself, I am not sure, maybe by Mr. Wood, and maybe by the Home Office of the Fidelity Company to which my attention was called, I think
156 by the Citizens National Bank or somebody in its behalf; at that time, I believe, Mr. Eichel was in town, and the talk I had with Mr. Cunningham was about representing the City National Bank in conjunction with my representing the Citizens if a suit were brought against those two banks on the indemnity bond, but certainly not with reference to bringing any Pittsburg suit, because I was out of that, never was in it.

X Q. 59. Were you counsel for the Citizens National Bank in this matter?

A. Yes, and in a good many other matters.

X Q. 60. Do you know what guaranty the Citizens National Bank of Evansville had against its liability on this indemnity of April, 1904?

A. Of my own knowledge, no.

X Q. 61. Have you any information on that subject?

A. It is rather vague information that I gathered from the talk in this Evansville Contract Company matter that it—No, I will take it back; I don't know anything about the Citizens having any such guaranty.

X Q. 62. Did you have anything to do about making the compromise or adjustment between Mr. Eichel and the City National Bank, about which reference was made this morning by its president, Mr. Reitz?

A. If it was the adjustment by which William Eichel was released on some notes, I did; what you probably mean is the First National Bank; if Mr. Reitz meant in his answer to you that the compromise was between the First National Bank and William Eichel I was present at part of that conference.

X Q. 63. You have been counsel for the City National Bank and the First National Bank, have you not?

A. No, sir.

X Q. 64. You have been personal counsel for Mr. Eichel and for Mrs. Eichel for years, have you not?

A. Yes, sir.

X Q. 65. Would you kindly inform us, if you know whether or not somehow, or in some way, indemnity was promised or furnished

in some shape to the three national banks of Evansville who signed the indemnity agreement of April, 1904?

A. I have no independent recollection about that, but my impression is there is some sort of indemnity, but whether it is verbal or written I do not recall.

X Q. 66. Don't you also know that some agreement, or arrangement, or indemnity of some sort was made or given in some shape to the Second National Bank of Parkersburg and to the Farmers and Mechanics National Bank of Parkersburg, also parties to that indemnity bond?

A. I have no independent knowledge of that; I think there is some sort of rumor to that effect, but I know nothing about it.

X Q. 67. Didn't you get that rumor from your clients Madison J. Bray, or Jacob Eichel, or some of those banks themselves?

157 A. No, sir; and besides, Madison J. Bray is not a client of mine; I don't want you to get that confused. I have appeared for him in one or two matters, but his regular counsel, Mr. James T. Walker, is another gentleman in this town, and I acted as counsel for Mr. Bray in one or two matters when Mr. Walker was out of town.

X Q. 68. I don't want to be impertinent, but I was under the impression that with relation to the affairs of the Evansville Contract Company since its bankruptcy your relations with Mr. Bray have been very intimate as counsel in his capacity as trustee and otherwise in connection with this subject matter.

A. You are mistaken about that; my relations, personally, with Mr. Bray are intimate; but I have never been his personal counsel except in one or two special instances, perhaps when his other counsel was out of town or could not act; I have only been his counsel as trustee of the Evansville Contract Company and in the administration of that estate up to the time I was relieved.

X Q. 69. Were you present at the conference, or the agreement, or the understanding had at some place, at some period to us unknown, when it was decided to throw this entire loss of those claims that you bought for whomsoever you represented on the Fidelity Company?

A. I was not.

Redirect examination by Mr. DUPUY:

R. D. Q. 70. In your cross examination you refer to certain claims which Mrs. Eichel had bought from funds raised in the Citizens' National Bank of this place, which leads me to infer that Mrs. Eichel bought claims other than those which were bought with the funds from the City National Bank upon which Mr. Bray was endorser?

A. That is true, thirty-five hundred in the Citizens' National Bank; I still owe it.

R. D. Q. 71. Now, in the matter of the negotiating for those claims and making the actual purchase of them, tell us to what extent, if any, Mr. Bray took any part?

A. Absolutely none so far as I know.

R. D. Q. 72. Mr. Frey, you are well enough acquainted with this

whole matter involving the winding up of the Evansville Contract Company's estate. Some questions have been asked you with reference to the so-called preferred claims. In the event those claims are paid out of the funds of this estate, to what extent, if at all, would such payment relieve the banks from their indemnity to The United States Fidelity and Guaranty Company?

To which question counsel for The United States Fidelity and Guaranty Company objects for the reason that it calls for a legal opinion, and is otherwise improper.

158 A. I don't think I ought to be called upon to answer that question.

Question is withdrawn by the attorney for the trustee.

(Signed) PHILIP W. FREY.

Witness Francis J. Reitz now hands to the notary a copy of the agreement referred to by him in his deposition, signed by Madison J. Bray, and the same is filed as Exhibit "A" to Mr. Reitz's deposition, and Mr. Ambler, counsel for The United States Fidelity and Guaranty Company, says that the same is accepted in lieu of the original as filed, but he would like to know the date of it if anybody can tell.

Mr. REITZ: It was the latter part of November, 1906, the dividend was declared November 28, 1906, and this instrument was executed prior to the declaration of the dividend.

Mr. AMBLER: Then, as I understand it, that paper was signed by Mr. Bray and delivered to your bank more than two years after April, 1904?

Mr. REITZ: Yes, sir, some time the latter part of November, 1906.

(Signed) FRANCIS J. REITZ.

JACOB EICHEL, of lawful age, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, deposes as follows:

Direct examination by Mr. DUPUY:

Q. 1. Mr. Eichel, in a recent deposition given in this matter by Mr. Wood he went into the matter of premiums alleged to be due to The United States Fidelity and Guaranty Company by The Evansville Contract Company and by the trustees; now, I have before me what I am told is an extract from the deposition of Mr. Wood; his company claims that at Lock Number Two, Big Sandy River, on bond executed November 13, 1903, running to November 13, 1904, there is due the sum of two hundred dollars. Please state what you know about that item.

A. The job on the Big Sandy River was completed before the company went into bankruptcy; the final and last payment by the Government was made December 13, 1903; the work was actually completed about two weeks before that, but before the Gov-

159 ernment make the final payment on any of the work the temporary work, such as cofferdam, has to be removed; the

contract proper was completed about a month before but the final settlement by the Government was made about December 14, 1903, and The Evansville Contract Company went into bankruptcy in February, 1904.

Mr. AMBLER: In order to save time counsel for the Fidelity Company says that premiums on Bond No. 94,682, Big Sandy, and on No. 230,229 on Dam 18, Ohio River, from November 21, 1905, to November 21, 1906, and Bond No. 236,839 Number 3, Ohio River, from September, 1905, to September, 1906, and the Congaree River bonds No. 229,788, from October, 1904, to October, 1906, are not insisted upon.

The deposition of Mr. Wood taken at Parkersburg in 1907 shows that the claims of the company are now as follows:

No. 230,229, Dam 18, Ohio River, from November 21, 1903, to November 21, 1904, $450.00;

No. 230,229, Dam 18, Ohio River, from November, 1904, to November, 1905, $450.00. And for Dam No. 3, Ohio River, Bond No. 236,839, September, 1905, to September, 1906, $250.00.

Q. 2. I understand, Mr. Eichel, from the remark just made and placed of record by the attorney for the United States Fidelity and Guaranty Company that the only premiums they now insist upon are as follows: Dam No. 18, Ohio River, No. 230,229, running from November 21, 1903, to November 21, 1904, $450.00; Bond No. 230,229, Dam No. 18, Ohio River, running from November 21, 1904, to November 21, 1905, $450.00; and Dam No. 3, Ohio River, Bond No. 236,839, from September 19, 1904, to September 19, 1905, $250.00, making a total claim for unpaid premiums of $1,150.00. Now, will you please take up those bonds, one by one, and give us your statement touching the liability of this company for premiums upon those several bonds?

A. Within the last two weeks I examined the books of the trustees at Parkersburg, which show the final payment by the government, when these contracts were completed. I will take up Lock 18, Ohio River. This statement shows from 1903 to 1904, this $450.00 the guaranty company filed as a claim against the estate, this was a debt of the company before it went into bankruptcy and it is filed as a claim against the trustees; the claim from November 21, 1904, to 1905, is correct.

Q. 3. Has that been paid?

A. No, sir, the trustees are liable for that bond; that premium of $450.00 ought to be paid.

160 Q. 4. Take up the next item, Dam No. 3, bond from September 19, 1904, to September 19, 1905, $250.00.

A. That lock wasn't completed until 1905 and their bond was issued in 1904, and the work was going on in 1904; that is correct; the trustees, in my judgment, are liable for that No. 3.

Q. 5. I understand you to say, however, as regards the first bond at No. 18, just spoken of, that is from November 21, 1903, to November 21, 1904, that the premium upon that bond accrued prior to bankruptcy?

A. Yes, sir.

Q. 6. And was filed by The United States Fidelity and Guaranty Company as a debt against the bankrupt?

A. Yes, sir.

Q. 7. And it was not, as I understand you, an obligation of the trustees?

A. It was not.

Mr. AMBLER: To the foregoing deposition of the witness Eichel the Fidelity Company objects and excepts, for the reason that it is incompetent and improper.

Cross-examination by Mr. AMBLER:

X Q. 8. Suits have been brought on all of these bonds mentioned in Pittsburg by the attorneys Hall & Metcalf, have they not?

A. Yes, sir.

X Q. 9. For the purpose of enforcing liens and claims against these bonds?

A. Yes, sir.

X Q. 10. And those suits have been brought in the name of your wife, have they not?

A. Yes, sir.

Mr. DUPUY: The foregoing question is objected to as entirely irrelevant as to the question as to the premiums upon said bonds.

X Q. 11. The agreement was that premiums should be paid as long as the bonds were in force, was it not?

A. No, the bonds are issued and stay in force until the work is completed and accepted by the government; that is what the bond is given for, to complete the work.

X Q. 12. You have none of those bonds at present, I believe?

A. I never had any of them.

X Q. 13. So your idea is that if fifty dollars' work was unperformed for the Government and a hundred thousand dollars' liability was outstanding against the bond for material that the premium would end as soon as the work was done, without regard to
161 the amount of liability upon claims; is that what you mean?

A. That is it; a bond is only given to finish the work and pay for the labor and material.

The attorney for the Fidelity Company objects to the opinion of the witness.

(Signed) JACOB EICHEL.

Mr. AMBLER: The notary is requested to wait upon Mr. Francis J. Reitz, the witness examined this morning, and to ask him to furnish a copy of the agreement referred to in the indemnity signed by Mr. Bray and filed with the deposition of Mr. Reitz; if that copy if furnished the notary is asked to certify it as having been so furnished, and if it is not so furnished the notary is directed to certify what response was made to his request; and this request is made by

counsel at the close of the day because he has no opportunity to recall Mr. Reitz.

STATE OF INDIANA,
County of Vanderburgh, To wit:

I, Adolph F. Decker, a Notary Public, do hereby certify that the foregoing depositions of Madison J. Bray, Francis J. Reitz, Philip W. Frey and Jacob Eichel were duly taken, sworn to, and subscribed before me pursuant to the annexed notice, at the time and place, and within the hours in the annexed notice specified, except that on September 4, 1907, there being no witnesses present, an adjournment of the taking of said depositions was taken until September 5, 1907, at the place and between the hours specified in said notice. And I do further certify that at the time of so taking the same I was a notary public in and for the county of Vanderburgh, and State of Indiana.

And I do further certify that pursuant to the direction of Mr. B. M. Ambler, counsel for The United States Fidelity and Guaranty Company, I waited upon the said Francis J. Reitz and requested of him a copy of the agreement referred to in the indemnity signed by Madison J. Bray and filed with the deposition of said witness Reitz, which copy was furnished me, and the same is attached to the deposition of witness Reitz and marked "Page 2, Exhibit 'A'—Reitz, Page 3, Exhibit 'A'—Reitz."

Given under my hand and notarial seal, this 14th day of September, 1907.

(Signed) ADOLPH F. DECKER,
Notary Public.

My commission expires Aug. 6th, 1910.

162 Costs of taking depositions, $28.00, paid by Madison J. Bray, Trustee of The Evansville Contract Company, in bankruptcy.

UNITED STATES OF AMERICA,
Northern District of West Virginia, To wit:

Office of T. A. Brown, Referee in Bankruptcy.

In Bankruptcy.

In the Matter of EVANSVILLE CONTRACT COMPANY, Bankrupt.

I, Thomas A. Brown, Referee in Bankruptcy, in said District, having my office in the City of Parkersburg therein, do hereby certify that the foregoing is a true, perfect and correct copy and transcript of the depositions of Madison J. Bray, of Francis J. Reitz, of Philip W. Frey, of Jacob Eichel, together with all the exhibits therewith filed and the certificates of Adolph F. Decker, Notary Public, thereon appearing,—which were received by mail and filed before me in my said office, on the 18th day of September, 1907, and which still remain there filed.

In testimony whereof, I have hereunto set my hand and seal 9th day of November, 1907.

T. A. BROWN,
Referee in Bankruptcy for the Northern District of West Virgin

Fee charged for copy & certificate $15.00.
Paid by U. S. Fidelity & Guaranty Co.

T. A. BROWN, *Refere*

163 *Stipulation.*

(Filed November 19, 1907.)

In the Circuit Court of the United States for the Northern Dis of West Virginia.

In Equity.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, Corporation,
vs.
M. J. BRAY, Trustee of the Evansville Contract Company, Bankr Second National Bank of Parkersburg, and Farmers & chanics National Bank of Parkersburg et al.

It is stipulated between counsel for plaintiff and defendants, Sec National Bank of Parkersburg, and Farmers & Mechanics Nati Bank of Parkersburg, that the cause as to the said Banks may be mitted to the Court at Wheeling on November 19, 1907, upon the murrers of said Banks, to be heard upon briefs to be filed with Judge of the Court within ten days from this date.

THE UNITED STATES FIDELITY & GUAI ANTY COMPANY,
By B. M. AMBLER, *Its Attorney.*
SECOND NATIONAL BANK OF PARKER BURG AND
FARMERS AND MECHANICS NATIONAL BANK OF PARKERSBURG,
By V. B. ARCHER, *Their Attorney.*

November 18, 1907.

Motion to Dissolve Injunction.

(Filed November 19, 1907.)

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

THE UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company, et al.

And now, November 19th, 1907, come Laura Eichel, Jacob Eichel, City National Bank of Evansville, Indiana, First Na-
164 tional Bank of Evansville, Indiana, Citizens National Bank of Evansville, Indiana, First National Bank of Rockport, Indiana, and Farmers Bank of Rockport, Indiana, by their attorney, William M. Hall, and move the court to dissolve the injunction heretofore granted in this case as to each and all of these defendants.

W. M. HALL,
Attorney for Laura Eichel, Jacob Eichel, City Nat'l Bank of Evansville, Ind., 1st Nat'l Bank of Evansville, Ind., Citizens Nat'l Bank of Rockport, Ind., 1st Nat'l Bank of Rockport, Ind., Farmers Bank of Rockport, Ind.

Affidavit of Jacob Eichel.

(Filed November 19, 1907.)

In the Circuit Court of the United States for the Northern District of West Virginia.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Plaintiff.
vs.
M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt, et al., Defendants.

Affidavit of Jacob Eichel in the Matter of Injunction.

STATE OF INDIANA.
County of Vanderburgh, ss:

Before me, a Notary Public in and for said State and county, personally came Jacob Eichel, who, being duly sworn, says that he is one of the defendants or parties named in the bill recited in the caption above; that he resides in Indiana, at Evansville, and has no residence in West Virginia; that he has read a copy of the affidavit of Laura

Eichel to be filed in this case; that he is familiar with the facts therein set forth and that said facts are true and he has verified such affidavit as will appear thereon; that in so far as said facts are averred by Laura Eichel as having been communicated to her or information given her by this deponent, said facts are true and correct; that this deponent makes the following statement of facts covering substantially the history of the failure of the Evansville Contract
165 Company, its bankruptcy and other matters, which, as affiant is advised, are relevant to the matter at issue in this case:

The Evansville Contract Company made an assignment to M. J. Bray, at Evansville, Indiana, the latter part of January, or the first of February, Frey attorney for Bray, and February 4th were forced into bankruptcy at Parkersburg.

Within a few days thereafter, it was suggested that after the Trustee or Trustees, were appointed, that they go ahead with and complete the work. This was discussed between the creditors and it was decided that the Trustees go ahead with the work. Bray, Dotson and Heine were elected Trustees.

About this time Woods, of the guaranty company, called at the office of The Evansville Contract Company, at Parkersburg, and the situation was fully discussed with him in the presence of M. J. Bray, C. H. Wright, C. D. Dotson, Philip W. Frey, A. Heine (now deceased), and J. Eichel. Mr. Woods thought, and expressed himself, that it was a good idea and the best thing to do, to let the creditors go ahead and finish the work. Mr. Woods, at that time, requested a statement of the material claims on the different work, as he stated that he wanted to find out what amount his company was liable for. J. Eichel said, "If you tell me what you consider preferred claims, we can give you the exact amount." Mr. Woods then explained what his company was liable for, according to the latest decisions of the United States Courts; among other things he said the courts ruled that they were not liable, for instance, for new boilers purchased, but, if a patch had been put on a boiler, it would come under the head of labor, and his company was liable. The bookkeeper, Mr. Heine, then made out a statement of all the material claims owing on each contract, where the Guaranty Company was on the bonds, and handed same to Mr. Woods in the presence of all the above named parties. Mr. Woods then left Parkersburg and did not return for about six weeks.

In the meantime, the creditors met at different times and the final program was laid out for the Trustees to finish the work. Mr. Bray agreed to negotiate $75,000 Receiver's Certificates to raise money to prosecute the work. After the order had been entered by the referee to permit the Trustees to go ahead with the work and issue $75,000 Receiver's Certificates Mr. Woods again appeared at Parkersburg and attended a creditors' meeting at Mr. Archer's office. Then, for the first time, he stated that his company had a lien on all of the plant of The Evansville Contract Company as well as all the percentage retained by the Government; that he would stop all arrangements made unless his company would get a guaranty from all of
166 the bank creditors to be held harmless. Mr. Woods stated at that meeting that he had just returned from South Caro-

lina and had inspected the work there. He said the condition of the work was about as J. Eichel reported, and, if the plant would have to be sold then, it would realize very little; while the plant if the work was carried on and kept in good repair it would be worth considerable money. J. Eichel spoke up and asked Mr. Woods several questions about the South Carolina job and expressed his surprise to learn that he had examined that work. "Yes," he said, "it it my business to look into those matters wherever trouble comes up," and he had examined all of the other work except 18, which he would examine while at Parkersburg. J. Eichel made a statement at that meeting, going over the situation in detail, over each place separately, and expressed the opinion that if the Trustees were allowed to go ahead with the work that at the end all the material claims would be paid in full and a very respectable dividend would be left to the general creditors. Mr. Woods listened carefully to the statement and said that he thought it could be done, but he would not consent for the Trustees to go ahead unless his company was indemnified as above stated, that they had a lien on the entire plant of The Evansville Contract Company and on the percentage retained by the Government, and unless their demands were complied with they would take possession of the entire plant. The representatives of the Parkersburg banks were present at that meeting. The Evansville and Rockport banks having no representative there.

Mr. Bray and J. Eichel left on the next train for Evansville, and made the statement to all of the banks just as Mr. Woods made it at that meeting: that they had a lien on all of the plant and the retained percentage. On the strength of this statement the banks signed the indemnity bond.

On account of the destructive floods in the Ohio Valley the net result was not expected, but no one was to blame except the elements.

William Eichel, Charles J. Eichel and Samuel Eichel were surety for the Evansville Contract Company to the Rockport banks for $25,000. Those banks brought suit on the notes of The Evansville Contract Company and made application to force the boys into bankruptcy. The boys were compelled to settle with the Rockport banks to save themselves from utter ruin. In this settlement the claims of those banks were turned over and assigned to the boys. In this settlement the banks insisted on a bond from the boys against any losses the banks may sustain on account of having given an indemnity bond to the Guaranty Company. The boys were helpless and had to comply with all the demands of the banks or be forced into
167 bankruptcy. This is how the banks obtained a guaranty to be held harmless and how the boys became the owners of the $25,000 claims of the Rockport banks.

After the Trustees had been elected J. Eichel having been employed by the Trustees for about one year, some of the material creditors suggested if he, Eichel, could make arrangements to raise some money that they would make a liberal discount on their claims. While they knew that their claims were perfectly good, being guaranteed by the Guaranty Company, but they would like for Eichel to get upon his feet again. Eichel told several of them that everything

he had was invested in The Evansville Contract Company, and all was swept away by its failure. But Mrs. Eichel had about $45,000 in her own right; he would discuss it with her lawyer and if it could be arranged to raise the cash, he would advise her to buy those material claims. After consulting with her attorney she made application to the City National Bank to borrow enough money to buy such material claims as would allow a good discount. The proposition to the bank was that Mrs. Eichel put up the claims bought as collateral security. The bank refused to make the loan for two reasons: first, they claimed it would be a long-winded transaction; second, they disliked dealing or having large transactions with women. They suggested that Bray knew all about the affairs, if he, Bray, would guarantee or endorse the notes the bank would furnish the money. Bray has for years made it his business to endorse notes or borrow money for parties whom he considered good and responsible by charging a reasonable amount for getting the money. Mrs. Eichel arranged with Bray if he would endorse the notes so the money could be raised she would allow him one-half of the profits made in the transaction. J. Eichel negotiated for the claims, made drafts with the claims attached on P. W. Frey, who gave his note, with Bray as surety with the claims as collateral to the bank. The bank carried this loan, about $27,600, until 1906, when it demanded payment. Bray was compelled and did raise the money outside of the bank and took up all of the notes with the claims attached. Then Mrs. Eichel gave her own note to Bray signed also by J. Eichel for the amount of about $27,000.

In 1905 Samuel and Charles J. Eichel bought the claims of the two Parkersburg banks, thinking then yet that the general creditors would realize from 25% to 30% when the work was finished. The material claims were considered preferred claims by the referee, but J. Eigenmann, through his attorney, Mr. Mason, objected and filed a protest, claiming that there was no preferred claims under the bankrupt law except prior mortgages over four months old. The
168 Referee ordered the Trustee to open the case again for further hearing and decision. That was about eighteen months ago. No decision on this point has ever been rendered by the former or present referee. The Trustees have made every effort to get that decision. Mr. Bray, sole trustee, has repeatedly requested personally and through his attorney, Judge Dupuy, to decide how this money should be paid out, as he is ready to pay it out according to the decision of the court. A number of general creditors take the position that all creditors must share alike and have employed counsel. Mr. Bray has nothing whatever to do with this proceeding nor has Laura Eichel. Mr. Bray is not interested in the general claims in any shape whatever. The City National Bank refused to advance as large an amount as $75,000 on the Trustee Certificates without Mr. Bray as guaranty or surety. Mr. Bray, on his name and credit, borrowed from $30,000 to $40,000 for which he was personally responsible without charging the estate anything. Without Mr. Bray raising this large amount of money the Trustees could not have completed the contracts. Mr. Ambler, the attorney for the Guaranty Company,

requested of the Trustees to be permitted to have an expert to examine the books and accounts of the Trustees, which request was readily and willingly granted. Mr. Ambler had at two different times an expert go over the books and accounts. He was further told that all books and papers are in the safe at the office of the Trustees at Parkersburg and are open for his inspection at any and all times.

The Guaranty Company hindered, delayed and blocked the settlement of this estate for over one year already. Twelve months ago they told the referee that they were through taking depositions. Two months thereafter they filed a petition to take further testimony. The same tactics have been practiced and petition after petition filed to open up the case again for the simple purpose of delay. The Guaranty Company has lost this estate a large amount by being compelled to defend the fictitious charges trumped up by it. Neither Eichel nor Frey have been in the employ of the Trustees for nearly two years.

In November, 1906, J. Eichel needed and requested assistance of the Evansville banks to get started again in business. The banks expressed a willingness to assist him but thought and requested that a compromise settlement should be made on the Evansville Contract Company claims they hold. Eichel then bought the claims of the First National Bank and Citizens National Bank. In the deal it was agreed that Eichel should hold the banks harmless on the indemnity bond given by them, which Eichel agreed to do. Up to this time (November, 1906,) none of the Evansville banks had any
169 bond to hold them harmless. The latter part of November, 1906, the First National Bank in liquidation intended to declare a 5% dividend but Mr. Reitz, the president, objected unless Mr. Bray would guarantee Eichel's bond that they would sustain no loss by reason of having given an indemnity bond. Bray, one of the directors of the bank, did then guarantee Eichel's bond. Eichel even did not know that until several months later.

The Guaranty Company claims that they had a lien on all of the plant of The Evansville Contract Company and that nearly all of the plant was located at Lock 18. While the facts are that only a small portion was at 18 and the biggest part of the plant was at places where other bondsmen were given. The exact amount of the plant located at each place can be found in the papers at Parkersburg. So, if the Guaranty Company had a lien at all on the plant located at the works where they were bondsmen, they surely could not claim or have the right to the plant located at other places where other bonds had been given.

About April 1, 1905, the Ohio River Contract Company was organized; Laura Eichel subscribed for thirty-five thousand dollars ($35,000) worth of stock. This amount she raised by M. J. Bray's endorsement, giving him as collateral security mortgage notes amounting to forty-five thousand dollars ($45,000) on the best business block in the city of Evansville, with an agreement that such deposit as collateral not only was to secure the thirty-five thousand dollar ($35,000) loan which paid for her stock subscription, but also secured any loss or damage which Bray might sustain on her account

for any former or other endorsement or liability, for which service said Laura Eichel agreed to pay said Bray five per cent. (5%).

JACOB EICHEL.

STATE OF INDIANA,
County of Vanderburgh, ss:

Before me, a Notary Public, in and for said State and county, personally came Jacob Eichel, who being by me duly sworn says that he has read the above affidavit and that the facts therein stated are correct and true.

JACOB EICHEL.

Subscribed and sworn to before me this 9th day of November, 1907.

[NOTARIAL SEAL.] ADOLPH F. DECKER,
Notary Public.

My commission expires August 6, 1910.

170 *Affidavit of Laura Eichel.*

(Filed November 19, 1907.)

In the Circuit Court of the United States for the Northern District of West Virginia.

No. —.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiff,
vs.
M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt, et al., Defendants.

Affidavit of Laura Eichel in the Matter of Injunction.

STATE OF INDIANA,
County of Vanderburgh, ss:

Before me, a Notary Public in and for said State and county, personally came Laura Eichel, one of the defendants in said bill of equity, who, being duly sworn by me, deposes and says:

First. I am a resident of the City of Evansville, County of Vanderburgh and State of Indiana, where I have my home, and I have no other residence, and I am a citizen of the State of Indiana. I do not reside within the State of West Virginia.

Second. It is not correct, as stated in the second paragraph of the bill, that the plaintiff therein has a lien upon a fund of twenty-seven thousand dollars ($27,000) in the handsandpossession of M. J. Bray, trustee, nor is it true that the plaintiff has a claim against that fund adverse to the pretensions, claims and possession of said trustee. The truth is there is a fund of about twenty-seven thousand dollars

($27,000) in the District Court of the United States for the Northern District of West Virginia, deposited in two banks at Parkersburg, as set out in the second paragraph of the bill, and that no one has or can have a lien thereon. There is no such thing as a lien upon funds in court. Furthermore, is the said M. J. Bray as trustee had any interest whatsoever in the controversy raised by the bill, it is manifest that it is to his interest to have said twenty-seven thousand dollars ($27,000) fund applied to the material claims referred to in the plaintiff's bill and sued upon by me. That it is not a correct conclusion of law or of fact, as stated in the second paragraph of the
171 bill, that this court has jurisdiction under section 8 of the Act of March 3, 1875, relating to the enforcement of liens, etc., on the contrary it is manifest, from a reading of the bill, that the said twenty-seven thousand dollar ($27,000) fund is in the hands of the District Court of the United States for the Northern District of West Virginia, a court of Bankruptcy, and that court has full and exclusive jurisdiction to distribute the same to and among those entitled thereto. It is not correct, as averred in said paragraph, that this court has any jurisdiction for any of the reasons set forth therein.

Third. It is of no consequence to me whether or not the plaintiff had any lien as set forth in its paragraph third of the bill, and I have nothing to do with this matter, and it should not affect me. As to this and the averments of the fourth paragraph of the bill as far as the lien matter is concerned, I am not concerned. If there is a lien on the fund in favor of the plaintiff or any other person, the said District Court is the sole tribunal for the adjudication thereof, and I have in no way retarded the adjudication by the said District Court, but have at all times attempted to get the same speeded, whereas, this plaintiff has by all means in its power sought to retard the same.

Fourth. As to the averment in the second paragraph marked seven of the bill, the only matter therein which I am advised that it is pertinent for me to answer herein is that in which the plaintiff states that it has no knowledge up to this time what claims are justly and properly recoverable for material or labor for which it would be liable. It is to adjudicate that very matter that I have brought suits which it is sought to enjoin in this proceeding. I have no concern with any representations made by Jacob Eichel as set forth in said paragraph seven, nor with the indemnity therein described to have been taken by this plaintiff. If the plaintiff has its indemnity, it has a right to sue thereon. I deny positively the allegation in paragraph eight of the bill that I or anyone had committed any fraud or been guilty of any bad faith to the plaintiff. I deny that Jacob Eichel ever assured plaintiff's agent Wood, as averred in paragraph eighth of the bill, that he would proceed to get control of all the claims as therein stated, and that he would guarantee that the plaintiff would have no trouble thereon, and that no demand should be made against it. I am informed by Jacob Eichel that this is an averment of fact entirely unfounded and untrue made by the plaintiff and sworn to by said Wood; but even if it were true, it would

not affect me, as whatever claims were bought by me were
172 bought without any knowledge of such statement, if it were made, and with my own funds and credit.

Fifth. As to the averments of paragraph tenth of the bill in so far as they affect me, the facts are that I bought the claims referred to in that paragraph, with the exception of the Riter-Conley claim and the Nicolette Lumber Company claim; I paid for them with my own money, Mr. Frey borrowing the money for me, with Mr. Bray's endorsement, and attaching the claims themselves as collateral security in addition to the endorsement, and some of the claims were bought for me by Mr. Frey, he borrowing the money *on* his own name, my information and belief being that they were at least fairly well secured by the assets of the bankrupt estate, or in any event by the bond of this plaintiff company, upon which I am now suing. It is not true that Philip W. Frey, or M. J. Bray, or Jacob Eichel, bought such claims in conjunction with me. I received assistance in a financial way from the said M. J. Bray, who is a man of large wealth and makes it his business in part at least to loan his money for a fee or charge and likewise to endorse. I took counsel on the matter as to whether or not I could safely buy these claims, and I made application to The City National Bank of Evansville, Indiana, to borrow the money. The bank declined to make the loans, because the period during which the loan would likely be carried would be indefinite. Mr. Bray advised the bank that it could safely make the loan, whereupon the bank suggested that Mr. Bray, if he had faith in it, should endorse the papers, and it was then arranged between me and said Bray that I would allow him one-half of the profits in the transaction for helping me to carry the loans. The money was arranged for in this way, and my attorney, Philip W. Frey, transacted the legal part of the business, taking the assignments in his name at my request, he paying the drafts attached to the assigned claims, and then assigned the claims to me on my request. The bank carried this loan—about twenty-seven thousand dollars ($27,000)—until 1906, when it demanded payment, and Mr. Bray was compelled to raise the money, which he did outside of the bank by borrowing it from a friend, as I am informed by him, and the claims are carried as for the purpose of representing that loan with interest, and then if the money is ever recovered any profits shall be divided between Bray and myself. Jacob Eichel, my husband, signed the note to Mr. Bray, because it is usual for the husband to so join in Indiana and also because Bray required it. The whole transaction was fair and above board, and there is nothing wrong about it, as I am informed and have always been informed
by counsel. My husband, Jacob Eichel, went about these
173 material claim creditors and negotiated the purchase of their claims for me and drew drafts on Mr. Frey. It is not true as averred in the tenth paragraph of the bill, that the buying of said claims was a violation of the trust and duties of said Eichel, Frey and Bray, or any of them. It is not true that my name was used as a mere mask or cover for the real parties. It is not true that Bray is the real owner of the claims, and that he has caused suit to

be brought in Pittsburgh. I am advised and believe that as a matter of law, even if Bray or Frey, or either of them, or my husband, had any interest, as averred, in said claims (which they have not except as herein stated), it would work no wrong or harm to the plaintiff. If Jacob Eichel is the owner of said claims in any way, let the plaintiff defend the same if it has any counter-claim against him; or if it has any counter-claim against anybody who is the owner thereof, let it assert such claims in the suit therein. Whoever is the owner thereof is entitled to a jury trial thereof and cannot be deprived thereof by this court. If any claims are unjust as labor or material claims, let them be objected to on the trial or in the proof in the bankruptcy case, where alone this matter must be adjudicated. These material claims which are owned by me aggregate, with interest, at this time upwards of forty thousand dollars ($40,000), as will appear by an inspection thereof in the plaintiff's bill. The total of these so-called material claims as proven in bankruptcy and existing in this case amounts to forty-two thousand five hundred one and 23/100 dollars ($42,501.23) on their face. Of these I am the owner of all except that of Riter-Conley Manufacturing Company. There is another claim of the Nicolette Lumber Company for some six hundred dollars ($600) which is not yet proven. This shows the face of all the claims owned by me to be thirty-seven thousand six hundred forty-three and 03/100 — ($37,643.03). Some of these are subject to slight reductions, but the aggregate will be approximately thirty-seven thousand dollars ($37,000). On this sum there is interest from the average date of about the first of April, 1904, making an accrued interest period of upwards of three years and six months, making the back interest about seven thousand seven hundred and seventy dollars ($7,770), thus showing the principal and interest account due me of about forty-five thousand dollars ($45,000). If all of the twenty-seven thousand dollar ($27,000) fund in the court of bankruptcy were awarded to the so-called material claims, my claims would get about seven-eighths (7/8) thereof, or about twenty-three thousand six hundred and twenty-five dollars ($23,625), but said fund is subject to charges for expenses of administration
174 and trustees' fees and referee's fees, and it is *now* know- when there will be a final determination, adjudication and distribution of said fund. In any event, I am entitled to receive from this plaintiff as the matters now stand about twenty two thousand dollars ($22,000), irrespective of the twenty-seven thousand dollars ($27,000) which it alleges these claims should receive in the estate of the bankrupt, and which I have been endeavoring by all means in my power to obtain notwithstanding dilatory tactics of the plaintiff.

Sixth. As to the averment in the twelfth paragraph of the bill that nothing has ever been done to adjudicate the question as to whether or not the so-called preferred or material creditors are preferred creditors, I am informed and believe, and my counsel has been informed by the Referee of the District Court at Parkersburg that all the testimony has been taken which either this plaintiff or any other person expressed a desire to be taken, and full hearing has been

had by the Referee and there is no reason why such dispute cannot be at once decided. This plaintiff has taken a large amount of testimony before the Referee, has fully argued its case, and I cannot understand why there is no decision.

Seventh. As to the averments on page twenty of the bill insinuating that the Trustees in Bankruptcy have not taken any steps to contest the claims of material men, I do not understand the relevancy as in any way affecting the plaintiff. If the claims are well founded, the plaintiff is liable on its bond given to the Government; if they are not, the plaintiff is not liable for any claims not well founded. The claims are duly proven in the bankruptcy court; they are all bona fide, itemized and sworn to, and there never has been an insinuation from anyone—not even this plaintiff—that they are not bona fide or valid. This plaintiff has had years to investigate and has found fault with none of them, and had never notified the trustee or anyone as to objections. The trustees have been notified by J. G. Eigenmann and other general creditors that the general creditors insisted that said claims were not preferred on the assets, and it was the duty of the trustees to represent such position of the general creditors to the referee and to see that no one creditor got an advantage over another, but that all stood alike in a fair distribution of the estate according to creditors' rights, and this the trustees have done, and nothing more have they done. I am advised by counsel and believe and aver that I had a perfect right to buy these claims, and I am also advised by counsel that as a matter of law and morals it would make no difference so far as this plaintiff is concerned if Bray
bought the claims (which he did not), or if Jacob Eichel
175 bought the claims, or if Frey bought the claims; that any such buying by Eichel or Frey or Bray, or all of them, harmed the plaintiff in no particular whatsoever, and was no fraud and could be no fraud, as Eichel, Frey and Bray, or any of them, if they had any trust relation to the estate would not be making money out of that trust relation in the purchase of such claims. But I aver that I bought the claims and was assisted by a loan of money and credit by said Bray and Frey. If I had not bought the claims this plaintiff would long since have been sued thereon and made to pay every dollar of debt and interest, and this it well knows. I am advised and believe that as far as this plaintiff's interests are concerned it is manifestly to its interests that said claims should be allowed as preferred and paid out of the twenty-seven thousand dollar ($27,000) fund in relief of the plaintiff, and instead of the trustees in bankruptcy harming your plaintiff by taking no steps to contest said claims, the trustees, if they did anything, as averred in paragraph twelfth of the bill, would be aiding the plaintiff's cause.

Eighth. As to the averments of the thirteenth paragraph of the bill, I am advised and believe that I have a perfect and legal right to sue on my claims, as I did at Pittsburgh, and the suits are pending in the State Court and in the United States Court brought all of them long before the bill in this case was filed. In the suits brought in the Court of Common Pleas of Allegheny County, of the State of Pennsylvania, this plaintiff has appeared as defendant by

counsel and pleaded to the issue, and the court has full jurisdiction and control of the said litigation; as to the suits brought in the Federal Court at Pittsburgh, I brought the same because I was advised by my counsel that by reason of a late decision of the Supreme Court of the United States I had a full right to bring the same; and knowing that the Courts of Common Pleas of Allegheny County are some three years behind in their work and that I could not obtain a trial in such court for about three years—this plaintiff having pleaded to the issue and averred facts in its counter-statement of claim which I believe to be false and fraudulent—I exercised my right to bring the suits in the United States Court, and I have a right to maintain the same there without dismissing the suits in the State Court, and I have a right to a speedy trial in the court which will first reach the cases. This plaintiff having put in its statement of defense in the cases brought in Allegheny County, tying up the trial for a period of about three years, I am advised by my counsel that it is no more than right that I should push the cases in the Federal Court to an issue and a speedy trial. It is not true, as averred in paragraph thirteenth of the bill, that these suits have not been brought for my use and benefit, but for the use and benefit and at the instigation of Bray; on the contrary I own the claims and they are my suits. It is not true that these suits are brought for the purpose of harassing and perplexing this plaintiff and for the purpose of multiplying suits and proceedings and to avoid the application of the primary fund; on the contrary I have been at all times pressing to speed the application of the fund of twenty-seven thousand dollars ($27,000), and any delay therein has been due to the plaintiff. That the administration of the twenty-seven thousand dollar ($27,000) fund would not decide the points in dispute between me and this plaintiff, as I have before stated, and I am entitled to a speedy determination as to who is entitled to the twenty-seven thousand dollar ($27,000) fund; and if I do not get my claims allowed against said fund as preferred, the plaintiff is bound to pay me my money in full and any balance over and above what I may get out of the bankrupt estate.

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It is not true, as averred in said thirteenth paragraph, that over sixty thousand dollars ($60,000) was realized from the sale of the property at Dam No. 18; on the contrary, while the whole plant of the bankrupt was sold by the trustees for sixty-one thousand three hundred dollars ($61,300), a large part of the plant which was sold when situated at Dam No. 18 was plant owned by the bankrupt at sites of Government work upon which this plaintiff never had any bonds and was brought by the trustees in bankruptcy to Dam No. 18 after the bankruptcy occurred. The total appraisement of the plant at Lock 18 and Dam 3 as made by the trustees was twenty-five thousand nine hundred and seventy-six and 80/100 dollars ($25,976.80). The appraisement of property at other sites amounted to in the neighborhood of twenty-three thousand five hundred dollars ($23,500); and I am advised and believe that of the sixty-one thousand three hundred dollars ($61,300) for which the plant was sold the plant at Dam 3 and Lock 18 should not be credited with more

than about one-half; all of which this plaintiff well knew, as did its agent Wood when he swore to this bill. That I have no concern in the fact that Bray and Jacob Eichel may have gathered unto themselves control of the claims against the bankrupt's estate; but if I had, I aver that this allegation is not true. I am informed by said Bray and believe he is truthful when he states that he does not own a single claim against this estate, and I am informed by Jacob Eichel and believe he is truthful when he states the facts in regard to his ownership which I hereinafter detail, as to the bank's claims.

177 Ninth. As to the averments of paragraph fifteenth of the bill, I am informed by my husband, Jacob Eichel, that the claims of the two Parkersburg banks and of the Rockport banks were bought by my sons Samuel and Charles J. Eichel, as they had a perfect right to buy them; that as to the Rockport banks' claims they were forced to buy them by reason of their relations to said banks, being surety to said banks. As to the Evansville banks, I have been informed by my husband, Jacob Eichel, that he was forced to buy their claims and to indemnify them because they were the only banks with which he could do business and obtain the necessary convenience in financing his business or that of the Ohio River Contract Company, which he formed after the wreck of the old company, The Evansville Contract Company. The claims of none of these banks are in my name as far as I know; but if they are it can make no possible difference to this plaintiff, as either my husband or my boys have a perfect right to put them in my name.

About April 1, 1905, the Ohio River Contract Company was organized; I subscribed for thirty-five thousand dollars ($35,000) worth of stock. This amount I raised by M. J. Bray's endorsement, giving him as collateral security mortgage notes amounting to forty-five thousand dollars ($45,000) on the best business block in the City of Evansville, with an agreement that such deposit as collateral not only was to secure the thirty-five thousand dollar ($35,000) loan which paid for *by* stock subscription, but also secured any loss or damage which Bray might sustain on my account for any former or other endorsement or liability, for which service I agreed to pay him five per cent. (5%).

LAURA EICHEL.

STATE OF INDIANA,
County of Vanderburg, ss:

Before me, a Notary Public in and for said State and county, personally came Laura Eichel, who, being by me duly sworn, says that she has read the above affidavit and that the facts therein stated are correct and true.

LAURA EICHEL.

Subscribed and sworn to before me this 9th day of November, 1907.

[NOTARIAL SEAL.] ADOLPH F. DECKER,
Notary Public.

My commission expires Aug. 6, 1910.

178 STATE OF INDIANA,
County of Vanderburg, ss:

Before me, a Notary Public in and for said State and county, personally came Jacob Eichel, husband of Laura Eichel, who, being by me duly sworn, says that he has read the above affidavit of Laura Eichel and that the facts therein stated are correct and true, and that the facts as stated by Laura Eichel in said affidavit upon information received from this affiant, are correct and true.

JACOB EICHEL.

Subscribed and sworn to before me this 9th day of November, 1907.

[NOTARIAL SEAL.] ADOLPH F. DECKER,
Notary Public.

My commission expires Aug. 6, 1910.

Affidavit of Philip W. Frey.

(Filed November 19, 1907.)

In the Circuit Court of the United States for the Northern District of West Virginia.

No. —.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation, Plaintiff,
vs.
M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt, et al., Defendants.

Affidavit of Philip W. Frey in the Matter of Injunction.

STATE OF INDIANA,
County of Vanderburg, ss:

Before me, a Notary Public in and for said State and county, personally came Philip W. Frey, of Evansville, Indiana, who, being by me duly sworn, deposes and says:

I am fifty years of age and am a practicing attorney of the Bar at Evansville, Indiana. I have known M. J. Bray, Jacob Eichel, and Laura Eichel for many years. I have already stated in my deposition taken at Evansville, in the matter of The Evansville Contract Company, Bankrupt, on September 5, 1907, in detail,
179 inter alia, what is now embodied in this affidavit. I understand that deposition has been filed before the Referee in the Bankruptcy Court at Parkersburg, West Virginia. My connection with the purchase of material claims against The Evansville Contract Company was as follows: In the early steps of the litigation, after Jacob Eichel had told me that it had been suggested to him

that he buy the claims, I told him I thought it was a good plan. He said he had not the money to do so, and I suggested that his wife, Mrs. Laura Eichel, buy them, and I would undertake to attend to the business for her. I suggested the method in which it should be done and in the same conversion, M. J. Bray being present or near at hand I asked him whether he would help me raise the money for Mrs. Eichel—the claims being put up as collateral. I do not know whether he agreed to it at that time, but he did shortly after. At that time it was not contemplated to buy all of the claims, and I bought two on my own responsibility. These claims are Nicola Bros. Company and Pittsburgh Trolley Pole Company, amounting to about $1,800.00, and belong to Mrs. Eichel. The money was borrowed at The Citizens National Bank of Evansville, and Mrs. Eichel has always carried the claims. From time to time Jacob Eichel, negotiating for his wife, made the purchases of the claims for her, notifying me that he had done so and had made a draft on me. When the drafts came in I would examine them and approve them and go to the City National Bank and advise the cashier that I would make a check that day and take up the draft, and that Mr. Bray would sign with me as surety. Afterwards all the notes were put together, and I signed one note covering the whole amount, and all the claims were attached as collateral to that note, and Mr. Bray signed under my name. This was all done for the benefit of Laura Eichel and as her transaction, I acting as her agent and attorney and M. J. Bray acting as her endorser or surety. Laura Eichel had her own separate estate and pledged the same in the transaction. I have known her for many years and have been her attorney and have an intimate knowledge of her affairs. She had at this time when this transaction was made mortgage notes on real estate in the City of Evansville, Indiana, and was a woman of some means. M. J. Bray did not purchase these claims or have any interest in them except that he was to be paid by Laura Eichel a fee for assisting her in carrying them. He is a man of considerable means and has for many years past carried on this kind of business, as is well known in the City of Evansville. The reason Laura Eichel's name did not appear upon the paper in the bank was that the bank did not desire to deal with a woman and have a woman on its paper to such a large amount. Subsequently the bank insisted that
180 this paper be lifted, and it was so done. M. J. Bray informed me that he had borrowed money to lift it from a friend, to whom he owed the money and still owes it, as I understand from him; and the material claims as bought by me for Laura Eichel, aggregating approximately thirty-seven thousand dollars ($37,000), were at all times attached as collateral to the notes in the City National Bank, upon which I was, and I understand are still held by Bray as collateral to a note signed by Laura Eichel and Jacob Eichel for twenty-seven thousand thirty-seven and 39/100 dollars ($37,037.39), being the amount of money that I paid for Laura Eichel, borrowing it through the City National Bank, on the purchase of those claims. While I at all times believed that M. J. Bray was to receive some sort of a bonus for his endorsements, at no time

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was I advised or had I knowledge of the sum to be paid M. J. Bray for such service. My connection with the transaction being simply that I advised Mrs. Eichel that she had a right to buy the claims in question, and acting for Mrs. Eichel, told Mr. Bray he had a right to endorse her paper. The details of such endorsements were matters between Mrs. Eichel and Mr. Bray. After all the claims in question had been bought by Mrs. Eichel—and my memory is now refreshed by seeing the original paper hereinafter referred to—Mr. Bray came to me to write an order on him as trustee directing him to pay one-half of the amount due me after payment of notes in the City National Bank, to the City National Bank (presumably for Mr. Bray's account). But even that gave me no knowledge of the exact amount Mr. Bray was to have in this transaction, because I knew that at that ime Mrs. Eichel owed Mr. Bray largely for money and endorsements besides her liability in this transaction, i. e., the buying of these claims. The $3,500 borrowed by me for Mrs. Eichel at The Citizens National Bank of Evansville, Indiana, which is still unpaid, went to pay for the two claims above referred to, and to assist William, Charles J. and Sam Eichel in settling debts to the Rockport Bank, upon which said last named gentlemen were sureties.

PHILIP W. FREY.

STATE OF INDIANA,
County of Vanderburg, ss:

Before me, a Notary Public in and for said State and county, personally came Philip W. Frey, who, being by me duly sworn, says that he has read the above affidavit and that the facts therein stated are correct and true.

PHILIP W. FREY.

181 Subscribed and sworn to before me this 9th day of November, 1907.

ADOLPH F. DECKER,
Notary Public.

[NOTARIAL SEAL.]

My commission expires Aug. 6, 1910.

Answer of M. J. Bray.

(Filed November 19, 1907.)

To be Filed in the Circuit Court of the Northern Dist. of W. Va. in Suit of U. S. Fidelity & Guar. Co. v. M. J. Bray et al.

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of the EVANSVILLE CONTRACT COMPANY, Bankrupt.

The separate answer of M. J. Bray, trustee, to a petition filed herein by the United States Fidelity & Guaranty Company, on the — day

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of September, 1907; and to an order or rule entered thereon by this court on the 21st day of September, 1907; which rule required this respondent to show cause before this Court at Wheeling, on the 19th day of November, 1907, why he should not be required and compelled to refund the money heretofore allowed respondent as compensation for services performed for this estate and creditors of said estate; and to show cause also why respondent should not be discharged from his place and position as trustee on account of charges preferred against him in said petition, and the documents therein referred to.

Respondent resides several hundred miles from the City of Wheeling, and has not up to this time had access to said petition, so as to enable him to know specifically what charges are preferred against him therein. He has been served with a copy of said rule and has been given a printed copy of what purports to be a bill in chancery, filed in the Circuit Court of the United States for this District against himself as Trustee and others, by the United States Fidelity & Guaranty Company, in which bill various and sundry charges or insinuations and inuendos of one nature and another are made against him, and he apprehends that this bill is one of the documents referred to in the rule which has been served upon him. This respondent in order to prepare his answer to this rule without
182 delay will hereby undertake to answer the charges preferred against him in the document above referred to, reserving to himself the right to make an amended or supplemental answer, when an opportunity has been afforded him of seeing the specific charges set out in said petition.

And this respondent in making this answer at this time or preparing it, does not hereby waive any right he may have to urge before this court any objections to said petition which he may be advised is proper for him to make.

And now, by way of answer, respondent says: That he has acted as Trustee of the estate of this Bankrupt since the date of the adjudication. For the period of about two years, he acted as joint Trustee with two others. Since then he has acted and is now acting as sole Trustee of the estate of this Bankrupt.

Respondent denies that at any time since he assumed the duties and relations of trustee has he knowingly or intentionally been guilty of any act of omission or commission to the detriment or prejudice of any person interested in this trust.

That during the period of his service, he has used his utmost endeavor to perform the arduous duties imposed upon him with the utmost good faith and fairness; but that in so doing he has been forced, in that he conceived to be the best interests of his trust, to oppose most seriously and emphatically the schemes and designs and wishes of many individuals, who were as respondent was advised and believed, seeking to fasten upon this estate their own personal claims and demands, which respondent believed to be inequitable and unjust. In doing this, respondent has incurred the displeasure and ill-will of certain designing persons, who sought to enhance their own personal interest at the expense of that of the creditors at large; and

he has opposed them to the extent of requiring and demanding of them that they litigate their claims before this court.

The foregoing remark is particularly pertinent and applicable to the United States Fidelity & Guaranty Company, as regards a claim which is asserted in a petition it filed in this matter on or about the 12th day of February, 1906.

This respondent, believing the so-called lien asserted in that petition to be invalid and unjust, and believing that said lien, if it ever had any validity, had been expressly waived by a solemn contract in writing, signed by the United States Fidelity & Guaranty Company, on the 11th day of April, 1904, has resisted said company in its efforts to fasten its alleged lien upon the assets of this estate, and has required of it that it submit the whole facts in regard to
183 this matter to this Honorable Court for decision; but in thus resisting the establishment of this pretended lien, respondent has incurred the ill-will and displeasure of the United States Fidelity & Guaranty Company; and in consequence thereof, the proceeding taken to have this respondent removed as trustee is but an effort to threaten and intimidate him in the discharge of his duty as an officer of this court, or failing in that, to have him removed and have substituted in his stead, some person who may be a pliant tool in their designing hands; and respondent charges that this becomes the more apparent when Your Honor glances over the record in this Bankruptcy proceeding, and sees that the active work of the Trustee in completing the several contracts which the Bankrupt had with the United States Government has been finished; that all of the steps necessary to be taken before the Referee, looking to a final winding up of this estate have been taken, and that the only thing remaining to be done in order to make a distribution of the funds which are on deposit in two of the depositories of this court, *in* the decision of the questions involved in the lien alleged by the United States Fidelity & Guaranty Company in its petition aforesaid, filed on the 12th day of February, 1906; and as to those questions arising thereon, the pleadings have long since been made up; the depositions and proofs have long since been taken and filed and the matter submitted for the decision of the Referee during the month of February, 1907.

But the United States Fidelity & Guaranty Company, in order to protract that litigation and to prevent a decision on said questions, has resorted to every conceivable, dilatory tractics; several times by having the Referee re-open the taking of depositions on its behalf; again by the institution of a suit in the Circuit Court of the United States for this District, seeking to litigate anew the very questions which it has heretofore submitted for the decision of the Referee, and now by the institution of this proceeding, whereby it seeks to have respondent removed as Trustee.

In this last named proceeding, as viewed from one of the documents, respondent believes to be filed herewith, most unfounded and scurrilous charges are made against respondent, which were known to the petitioner (if it knew anything about the facts in relation hereto) to have been false at the time they were made, and filed.

Respondent here denies each and every charge thus preferred against him imputing to him bad faith, collusion, combination or conspiracy. He says that each and every charge to the effect that he bought the labor and material claims in this matter or any one of such claims, is false; that each and every charge that he has, whether acting alone or in conjunction with P. W. Frey and Jacob
184 Eichel, or either one of them, combined and colluded with any one or more of the creditors or any other person interested in this estate, is false.

Now respondent will go somewhat into details by way of answer to what he conceives to be the actual charge preferred against him.

Respondent denies that he is the owner, or is in any sense interested, either directly or indirectly, in any one of the general creditors claims against this estate, and his only interest in any of the so-called preferred claims is, as will be hereinafter stated, and as has heretofore been stated by him in his deposition heretofore given in this cause.

As regards the claims of the class known as general creditors, respondent in the outset desires to correct a slip of the tongue, as appears from his said deposition, wherein he said he did not then own and never had owned any claim of that class. This statement is correct so far as it relates to his then ownership or present ownership of any such claim, but is inaccurate in this: That at one time he did own a claim held originally by the Old National Bank of the City of Evansville, Indiana, of the class known as general creditors; and in this connection respondent desires to state the circumstances under which he acquired ownership of that claim; it being material and pertinent just here as tending to show the lights which were before him in his subsequent conduct, and his good faith throughout this whole matter and those circumstances were as follows:

Prior to the entry of the decree of the 11th day of April, 1904 whereby the Trustees were directed to prosecute to completion the unfinished contracts of the Bankrupt, and to issue Trustees' certificates to the amount of seventy-five thousand ($75,000.00) dollars as a first lien upon the assets of this estate, the propriety and possibility of having such a decree entered and carried into effect, had been under discussion for several weeks between a number of the creditors taking the most active part in the affairs of this estate at that particular juncture. It is true those creditors were totally inexperienced in this class of work, with the possible exception of Jacob Eichel; and his experience had brought the Evansville Contract Company into this Court as a Bankrupt, and finally landed him into bankruptcy personally. Neither one of the trustees had had any experience in this class of work, but the active and perhaps the larger creditors conceived an idea that a possible profit to this estate of a considerable sum of money, would be derived from the completion of these contracts, and those creditors desired to have the contracts completed, under the supervision and direction of this court.

185 At this juncture, the United States Fidelity & Guaranty Company, through its agent Charles Wood, and its attorney B. M. Ambler, interposed what for the time being appeared to be a

most serious obstacle in this, that they claimed to have some sort of contract with the Bankrupt, which they, however, did not exhibit, giving said Guaranty Company some sort of power and dominion over the entire assets of the Bankrupt; by means of which it had the power to defy the proceeding in bankruptcy; to take charge of the entire plant and assets of the company, and complete these contracts itself; and it threatened to exercise its alleged power and to enforce an alleged lien upon these assets, unless certain creditor banks executed to said Guaranty Company an indemnifying bond in the penal sum of seventy-five thousand dollars.

Said Guaranty Company was asked to exhibit this contract, which under some pretense, it failed to do, but the creditors taking an active part at that time, believed the statement made them to be true, and accepted it as the truth; and just here it may be remarked that this contract, although subsequently called for, was never produced until two years thereafter, that is to say, on the 12th day of February, 1906, when said Guaranty Company filed its petition herein and up to that time neither the trustees nor their attorneys, nor any creditor, unless perhaps those represented by B. M. Ambler, knew anything as to the actual facts about this contract.

At these informal meetings of the creditors above referred to, it was determined that there was no alternative open to them except to yield to the demands of the United States Fidelity & Guaranty Company, and procure it an indemnifying bond signed by the creditor banks in the penal sum demanded. Several of these banks resided in the City of Evansville, Indiana, the home of this respondent; two others residing at Rockport, Indiana; and two others residing at Parkersburg, West Virginia; and this respondent being requested thereto agreed to use his efforts to procure the signatures to such a bond from the Evansville banks, his home town. Thereupon, the said B. M. Ambler, prepared a bond in the penalty aforesaid, which was proposed to be signed by the Evansville banks and the Parkersburg banks, and the names of these banks were inserted in said bond. He also drew up resolutions to be adopted by the Board of Directors of these several banks, authorizing the execution of the said bond, and turned these documents over to this respondent, who in company with Jacob Eichel, left Parkersburg for the City of Evansville, Indiana, on the mission above described.

When respondent reached Evansville, the Old National Bank of that City, one of the banks whose signature was desired and
186 the holder of a claim in the sum of about fifteen thousand —
($15,000.00) of the class known as general creditors, declined to sign said bond. Respondent fully appreciating the influence of this refusal might have upon the other banks, he thereupon repaired to the City of Parkersburg, and reported the obstacle with which he had been confronted, and particularly did he report this fact to B. M. Ambler, attorney for the United States Fidelity & Guaranty Company, and said Ambler thereupon amended the papers which were then in the hands of this respondent by striking out the name of the Old National Bank of Evansville, Indiana, and inserting in a new set of papers which he drew up, the names of the two creditor banks of

Rockport, Indiana, and he thereupon prepared resolutions to be adopted by those banks, and with these amended documents this respondent and Jacob Eichel started for Rockport, Indiana, to procure the signature of these banks, and of the other banks at Evansville, Indiana. This respondent apprehending the declination of the Old National Bank of Evansville, Indiana, might operate injuriously upon the plan these creditors had mapped out, and might cause other banks to decline to sign this bond, bought out the claim of the Old National Bank, at twenty-five cents on the dollar, and took an assignment thereof. And he thereupon got the three other creditor banks at Evansville, Indiana, and the two creditor banks at Rockport, Indiana, to sign said bond, and adopt said resolutions; and he as soon as possible returned to the City of Parkersburg with these documents executed in accordance with the form and plan mapped out by said B. M. Ambler.

Upon his return to Parkersburg, West Virginia, with the papers aforesaid fully executed, at a meeting or conference which was informally held one night in the office of V. B. Archer, in said city, who was attorney for the Farmers & Mechanics National Bank of Parkersburg (which was one of the proposed indemnitors), and possibly for some other creditors, there were present said B. M. Ambler, who was attorney of record for the Second National Bank of Parkersburg (another of the proposed indemnitors), and possibly for some other creditors, and also attorney for the United States Fidelity & Guaranty Company. There were present also at said meeting, C. D. Dotson, another creditor of said bankrupt, and E. M. Gilkerson, cashier of the Second National Bank, and a number of other gentlemen whose names respondent does not at present recall.

At that meeting and in the presence and hearing of all these parties, this respondent made an open, full and public disclosure of the fact that he had bought the claim of the Old National Bank
187 at twenty-five cents on the dollar, and stated his reasons therefor. There were some comments made by parties present rather in a jocular way, and no person present uttered the slightest word of protest, or condemnation, but rather of approval and applause.

Thus it became known to the United States Fidelity & Guaranty Company by a public disclosure made by respondent of the very first time he became in the slightest degree interested in the claim of any creditor of this estate.

Prior to this meeting and at the time when respondent was in the City of Evansville, Indiana, and before he purchased the debt of this creditor, but whilst he had it under contemplation, he sought advice of the following attorneys, all of whom are regarded, then and now, as attorneys of the first rank in said city, namely:

Philip W. Frey, who was the personal attorney of the respondent. C. A. Cunningham, who was at that time attorney for the City National Bank and the First National Bank of Evansville, Indiana, both signers of said indemnifying bond, and was likewise attorney for the United States Fidelity & Guaranty Company, as this record will disclose. Through Jacob Eichel, respondent procured the

opinion of Alexander G. Gilchrist, who is at present Judge of the Circuit Court of Vanderburgh County. All three of these most reputable attorneys advised that it was perfectly proper and legal for this respondent to purchase said claim.

Thus it was that in the only claim which respondent ever purchased against this estate, he had the advice of three reputable attorney- of his right to make the purchase, and he gave information of his purchase to several other attorneys in Parkersburg; one of whom was attorney for the United States Fidelity & Guaranty Company, and one of the attorneys in Evansville with whom he consulted was also attorney for the said United States Fidelity & Guaranty Company; so if there had been anything legally or morally wrong in the purchase of such claims by your respondent while he acted as trustee, he certainly was not advised of it. And from that time on, while he never purchased any more claims and disposed of the one he had, yet he has never believed that there was anything legally or morally wrong in such transaction.

And now respondent will make reply to the charge that he is the owner of or interested in that class of claims known as preferred claims. He here asserts that he is not now and has never been the owner of any one or more of that class of these claims; but that he does hold a certain number of said claims as collateral security for money he advanced or caused to be advanced to Laura Eichel, with which she purchased the same.

188 The full details of that transaction were disclosed by this respondent in his deposition given herein on the 5th day of September, 1907, at Evansville, Indiana. Respondent will here recite some of the circumstances leading up to this transaction:

Jacob Eichel, who was President of the Evansville Contract Company, and a large stockholder therein, was made a Bankrupt by the insolvency of this Company, and was within a few months after the Company was placed into Bankruptcy, himself adjudged a Bankrupt. Samuel Eichel and Charles J. Eichel, sons of the said Jacob Eichel, were endorsers in the Rockport Banks for the Evansville Contract Company in a large sum of money, and they were bankrupted practically by reason of their endorsements aforesaid, although the bankrupt proceedings instituted against them were finally dismissed. Nevertheless, it swept from these young men all they had in making good their suretyship aforesaid.

Mrs. Laura Eichel, of Evansville, Indiana, the wife of Jacob Eichel, and the mother of said Samuel and Charles J. Eichel, was a lady of considerable property, and the friend and neighbor of this respondent. She, desiring if possible to aid in some manner the depleted estates of her family, was advised that she could buy certain debts against the estate of this bankrupt at a discount, and thereby earn something, applied to the City National Bank of Evansville, Indiana, for a loan or loans with which to buy up some of these claims from parties who desired to sell them at a discount, and she thereupon requested the bank to make her the loans necessary upon her own notes, to which she proposed to attach the claims purchased as collateral security for the notes. This application was referred to

the Board of Directors, of which respondent was a member, and was voted down by the Board. The President of this bank, in speaking of this matter to respondent asked him what he thought of such a loan; and respondent stated to him that he thought the loan, while necessarily a long one, would in the manner proposed by Mrs. Eichel, be a safe one; and in reply to this the President then remarked to respondent that if respondent thought the loan a good one, and would put his name on those notes as endorser, the bank would let Mrs. Eichel have the money, taking the claims purchased as collateral security. To this suggestion respondent agreed after consultation with the Eichels, and the bank agreed to make the loan in the manner last above indicated. So then from time to time as Mrs. Eichel purchased a claim that fact was reported to the bank and a note was executed by Philip W. Frey as her attorney (the bank declining to have any dealings with a married woman);
189 and the note or notes were from time to time endorsed by respondent as purchases were made; the claims purchased being attached to each note as collateral security and turned over to the bank, by which they were held; and respondent during this period of time having no earthly interest in this transaction except so far as his obligation as endorser upon these notes made him interested.

These notes were carried at the bank for about two years or until some time in May, 1906, when the bank declined to carry them any longer, and called upon this respondent as endorser to make good said notes, which at that time aggregated something in excess of twenty-seven thousand ($27,000.00) dollars.

Whereupon respondent did take up those notes as endorser by paying to the bank the full amount due thereon, and along with the notes turned over to the respondent the collaterals which were the several claims purchased with the money realized from the discount from said notes. Later on respondent requested Mrs. Eichel, who was at that time unable to pay off these obligations, to execute to him one note covering the aggregate of all of these notes, which she thereupon did, and to which was attached the same collateral that had been attached to the notes above spoken of, and which had been held by the bank, and from that day to this respondent has held this note of something in excess of twenty-seven thousand ($27,000.00) dollars with the claims aforesaid as collateral security. Respondent says that Mrs. Laura Eichel is the owner of property situate in the City of Evansville, Indiana, worth at least the sum of eighty or ninety thousand dollars.

When Mrs. Eichel gave to respondent the one note covering the aggregate of all the other notes, it was agreed that this respondent should have in compensation for the use of his money and his credit, and the risk and hazard to which his money was subjected in this transaction, one-half of whatever profit Mrs. Eichel made upon the claims so purchased by her.

The foregoing is a full and frank disclosure of this transaction, and is the same disclosure which was made by respondent in his deposition given before the institution of this proceeding. If there be anything legally or morally wrong in this transaction, respondent

was ignorant of such wrong. Certainly none was intended, and no advantage has been taken of any one, and neither did respondent in any sense use his official position in consummating this matter.

Respondent never at any time approached any one of the original holders of these claims from whom Mrs. Eichel purchased, asking them to sell their claims, and he never made any effort to purchase such claims; and never knew until the purchase had been
190 made by Mrs. Eichel or her representative, from whom they were made, nor the amount of such purchase, nor the terms thereof.

All of the parties from whom Mrs. Eichel purchased these claims were regarded as first class business men, who knew their rights; who knew the status of their claims; knew of their right to recourse upon the bond of the United States Fidelity & Guaranty Company, and were fully aware so far as respondent knows or believes, of all of their rights, and of the circumstances in regard to the status of their claims. Each and all of said claims had prior to the time they were sold to Mrs. Eichel, been proved in these bankruptcy proceedings; had been allowed as proven debts, and established debts herein, and this respondent had no hand whatsoever in seeking to get these claims proved or allowed; but it had all been done by the original holders themselves and by the act of this court.

The sale of these claims to Mrs. Eichel was a voluntary and free act of the holders thereof, who sold them as a business proposition, and because they preferred the money they realized therefrom in cash to holding the claims until the day of distribution of assets in this court arrived, and going through the necessary litigation to collect them on the bond of the United States Fidelity & Guaranty Company.

So far as respondent knows or believes, no one of the original holders who sold their claims to Mrs. Eichel has ever yet uttered a word of complaint, and they are not to-day complaining in any sense of those transactions.

Respondent is advised and charges that if there be anything technically wrong in the fact that he endorsed the notes for Mrs. Eichel in order to enable her to raise the money to buy these claims, or that she agreed to give him in compensation for the use of the money, which he ultimately had to pay in order to keep up those notes, and for the hazard and risk he incurred thereby, part of her profit, if any, on the claims purchased with said money, then the right of complaint is in the parties with whom these transactions were had and *and* not in the United States Fidelity & *Trust* Company, who, so far as this record shows, is not even a creditor of this estate.

Respondent charges that the United States Fidelity & Guaranty Company has known or had the means of knowledge from this record that respondent did aid and assist Mrs. Eichel in the purchase of these claims. This allegation is distinctly made in the petition filed herein by John G. Eigenmann, in which he asked that the order of the Referee entered on the 19th day of November 1904, whereby these claims were established as preferred claims, should be re-opened and reconsidered. Said Eigenmann filed two petitions touching this-

matter in this record; one in December, 1905, asking upon his
191 own motion that the decree of 1904 be re-opened and reconsidered; and another filed in February, 1906, asking that the trustees be required to file a petition making the same request. To the first of these petitions B. M. Ambler, appeared and demurred to the petition, and resisted the application to have a rehearing upon the questions raised in the petition of Eigenmann, and successfully resisted it. He was at that time opposed to re-opening that matter and his opposition, so far as respondent knows, continued; although the petition of Eigenmann distinctly alleged that respondent had aided Mrs. Eichel in the purchase of these claims.

Replying now to the charge that this respondent as trustee has taken no steps to have the decree adjudging these claims as preferred claims, reconsidered, he desires to say that this charge is false, as the record will show. He, as trustee in conjunction with his co-trustees did file a petition to that effect and the referee did enter an order granting a re-hearing upon this very matter and re-opening the matter, and thus setting aside the decree of 1904 whereby the claims had been adjudicated preferred claims.

It was for this purpose that Eigenmann had appeared in court and filed his two petitions, and it was not until after this had been accomplished that Eigenmann, through his counsel, asked leave of court to withdraw from further appearance touching this matter.

Respondent has been unable in the brief research of the original record to find the decree of the referee granting a re-hearing upon the question as to whether these were preferred claims, but he distinctly charges that such an order was entered, and that B. M. Ambler was present when the referee made this decision and entered this order.

The orders entered by the referee are not entered in any book but are simply made upon loose sheets of paper, and the referee who rendered this decision is now out of office, and the order carrying out the referee's public decision cannot now be found, but that he so decided there can be no doubt, and it was not until after this decision was rendered and Eigenmann had accomplished all for which he came into this case that he ever withdrew.

In confirmation of this statement, respondent refers to the bill of complaint sworn to and filed by the United States Fidelity & Guaranty Company in the Court of Common Pleas in Allegheny County, Pennsylvania, whereby an injunction against certain proceedings instituted by Laura Eichel was asked. On page 7, paragraph 11, of
that bill the United States Fidelity & Guaranty Company,
192 after referring to the decree of the 19th of November, 1904, which established certain debts as preferred debts, says:

"A re-hearing of the matter adjudged under the decree of November 19th, 1904, has been allowed."

So that by the sworn admission of the United States Fidelity & Guaranty Company, a decree was entered upon the petition filed by these trustees granting a re-hearing of the decree of the 19th of November, 1904, which latter decree did determine what claims were entitled to be classed among preferred claims. Therefore nothing remained for the trustees to do in further prosecution of their petition

asking this re-hearing. It had been granted, and the matter stands now as though the decree of the 19th of November, 1904, had never been entered.

The United States Fidelity & Guaranty Company in one of its documents filed in this proceeding charges that about the time it filed its petition in this cause on the 21st day of February, 1906, it discovered that the attitude of respondent as trustee in regard to these preferred claims had changed, and that respondent was contesting certain rights which the Guaranty Company claimed to have by way of lien upon the fund in these proceedings as its indemnity. Whatever may have been the private views of respondent as to the legality of the contention made by the United States Fidelity & Guaranty Company, can certainly not affect its rights, when its rights were not left to this respondent to pass upon but had been submitted to the referee.

In this connection, however, respondent will say that upon the filing of the first petition by the United States Fidelity & Guaranty Company on the 12th day of February, 1906, was the first time either he or his counsel had ever had an opportunity to see the contract or an alleged copy of the contract which the Guaranty Company claimed to have had with this bankrupt. This was practically two years after the adjudication in bankruptcy and after demand had been made upon the Guaranty Company to exhibit a copy of this contract; and it was after all of the locks and dams had been fully completed. So soon as respondent and other creditors had seen what purported to be a copy of the supposed contract, respondent was advised that the alleged lien under that contract was far different from what it had been represented to the creditors at or about the time of the adjudication in bankruptcy; that it was an invalid lien, if any lien at all, and that this pretended claim and lien if it ever existed had been expressly waived by the United States Fidelity & Guaranty Company at the time the bank gave its bond of indemnity, and respondent being advised as trustee that the Guaranty Company has no such rights as it pretended to have in its petition did resist
193 that petition and has resisted it up to this time, and this resistance is the cause of the ill-will which now manifests itself toward him by this Guaranty Company.

Respondent denies that he is in any sense the instigator of the litigation which has been instituted by Laura Eichel against this Guaranty Company in the City of Pittsburgh. He admits that he was entitled to hold for his indemnity the claims she has brought those suits upon but he is advised and charges that it became his duty as the holder of such collateral to permit Laura Eichel to bring suit upon that collateral whenever she so elected; and had he refused and declined to permit her to enforce the collection of this collateral and she had suffered thereby, he would have been forced to give her credit for whatever loss she sustained by his refusal to permit the suits to be brought. It is in this sense, and in this sense only, that he had anything in the world to do with the institution or prosecution of those suits. He was under the law as the holder

of this collateral bound to accede to the demand of his debtor to permit that collateral to be put in process of collection.

Respondent in further evidence of his good faith in this trust reposed in him, desires to state that when the order of April 11th, 1904, was entered giving the trustees authority to issue certificates and negotiate certificates to the extent of seventy-five thousand dollars ($75,000.00) in order that they might have sufficient operating capital to conduct the business of the bankrupt, that it was impossible to get any of the banks with which he was in any sense connected, or any other person of financial standing, to advance the money on these certificates at anything like par value, except the City National Bank of Evansville, Indiana, of which respondent was a director. At one time when this bank was the holder of the certificates to the amount of twenty-five thousand dollars ($25,000.00) it declined to advance any more money upon such certificates unless this respondent personally guaranteed the payment thereof, and your respondent in order to further the ends of the creditors interested in this trust, did obligate himself for the payment not only of the twenty-five thousand dollars ($25,000.00) already advanced by this bank, but for the remaining forty-five thousand dollars ($45,000.00) making an aggregate of seventy thousand dollars ($70,000.00) which was realized upon these certificates from the bank aforesaid upon the personal guarantee of this respondent. In regard to this matter, perhaps respondent was just as wrong technically in thus obligating himself in bank to help along certain creditors of this estate as he was when he subsequently obligated himself in bank to help Laura Eichel. He did it all in the utmost good faith and good will
194 and with no idea or intention of wronging anyone. Especially did this guarantee on his part work to the benefit of the United States Fidelity & Guaranty Company because by this means the trustees were enabled to complete the contracts by an outlay of about four hundred thousand dollars ($400,000.00), for which completion the Guaranty Company was primarily obligated and bound.

Respondent desires further to state that when the First National Bank of Evansville, Indiana, which had signed the indemnity bond aforesaid was going through liquidation, and was ready to declare a dividend to its stockholders the President of that bank declined to permit the dividend to be declared or paid out until the bank had what he considered sufficient indemnity against its own obligations as one of the indemnitors upon the bond of the United States Fidelity & Guaranty Company, and said President approached respondent with the suggestion that he personally give the bank the desired additional indemnity. Whereupon respondent realizing that it was through his influence, in part at least, that this bank had signed the indemnifying bond to the Guaranty Company, felt that there was some moral obligation upon him to comply with the request of the President, particularly in view of the fact that respondent was a member of the Board of Directors of that bank. Whereupon, he gave, on the 28th day of November, 1906, the desired additional indemnity, and respondent desires to call this fact to the attention of this court as evidence in rebuttal of the charge preferred

against him that he has an interest in this transaction adverse to that of the Guaranty Company, because being an indemnitor of this bank his liability will be discharged when the liability against the bank is discharged, and whatever interest he may have in the preferred claims held by Laura Eichel serves again to place his interests identically in line with that of the Guaranty Company, because so soon as the preferred claims held by Laura Eichel are paid, just so soon will he realize upon his note of twenty-seven thousand dollars ($27,000.00) due him by Laura Eichel. So then, viewing this matter purely from the standpoint of personal interest, respondent's personal interest is identically in line with that of the Guaranty Company, first to the extent of the liability which this Evansville bank may be under as indemnitor of the Guaranty Company, and second, to the extent of the twenty-seven thousand dollars ($27,000.00) which is due him by Laura Eichel, and which was invested by her in these preferred claims.

The court will see that if the funds in the hands of the trustee are applied to the discharge of that class of claims known as preferred claims, and for which the United States Fidelity & Guaranty
195 Company is bound, such application will not only relieve and inure to the benefit of said Guaranty Company, but it will inure to the benefit of this respondent in this: That it will discharge him from his liability as guarantor to the Evansville bank and it will enable Laura Eichel, the holder of a large number of those claims, to reimburse him to the extent of twenty-seven thousand dollars ($27,000.00) for money he advanced her, with which to buy those claims. Therefore, instead of the interests of respondent being inimicable and antagonistic to that of the Guaranty Company, they are identically the same, and the charge made that the defense which he is urging to the contentions set up by the Guaranty Company is prompted by self-interest on the part of this respondent, is thus shown to be absolutely untrue. On the contrary, he had been prompted by what he conceives to be the interests of this trust estate, without regard to what may be his interests personally or that of the Guaranty Company.

It is charged in one of the exhibits filed in this proceeding that there is a conspiracy and combination between respondent and Jacob Eichel; that Jacob Eichel from the very inception of these bankruptcy proceedings occupied a trust relation thereto, such as debarred him in law and good conscience from becoming the owner of any of these claims, and your respondent having aided the wife of Jacob Eichel to purchase them, is charged with bad faith in that particular. In connection with this allegation it is charged that whatever claims, either Jacob Eichel or this respondent have become interested in, either directly or indirectly, have consequently become tainted, and this court is appealed to to put the stamp of disapproval thereupon.

Respondent requests this court, after reading these charges to read further in said exhibit the allegation made by the United States Fidelity & Guaranty Company that before any of these claims were bought, this Guaranty Company, through its agent Charles Wood,

entered into a bargain with said Jacob Eichel whereby Eichel agreed with him as a representative of this Guaranty Company that he would go out and buy up all of these claims of the class known as preferred claims. Now whether this last allegation be true or false, this respondent knows nothing, but the United States Fidelity & Guaranty Company swears in its bill filed as an document herein that it is true, and that it did have this bargain with Jacob Eichel in advance.

Respondent is advised and charges that if there was anything wrong and corrupt in the conduct of Jacob Eichel in procuring the purchase of these claims on his own account, or that of his wife, then it was equally wrong and corrupt for him to have lived
196 up to the alleged bargain, which the Guaranty Company claims it colluded with him in making for the purpose of doing this very thing. Certain it is whether Jacob Eichel ever agreed with Charles Wood to carry out a scheme which is now denounced as nefarious, it is very evident that the said Charles Wood put into the head of Jacob Eichel the very idea of buying those claims in the outset of these proceedings, or else he now claims to have entered into a contract and compact with him to do the very thing which is now denounced by his principal as unlawful and it would seem that in the eyes of the United States Fidelity & Guaranty Company, the chief complaint lodged against Jacob Eichel and this respondent as his alleged co-conspirator in regard to these claims, is that Eichel does not now turn over and deliver to said Wood and the United States Fidelity & Guaranty Company the fruits of the compact, which Wood said he made with him, and which Wood's principal says should now be lived up to, although they denounce it as an unlawful and unjust compact.

Since dictating and writing the foregoing the attorney for this respondent has been given by the attorney for the United States Fidelity & Guaranty Co., a copy of what *reports* to be the petition, which it has filed in this court. In which among other things there are five specifications of charges preferred against this respondent, and now this respondent will make specific answer to these five specific charges.

1. As regards the first charge that this respondent and P. W. Frey acquired claims against the estate of the bankrupt of the face value of $35,000 at and for the price of about $27,000, and that they then caused these claims to be proved and established as first liens on the funds of the bankrupt estate is absolutely and totally untrue. As has already been stated in this answer this respondent has never bought any one of the so-called preferred claims, and his only connection therewith is as has been heretofore expressly stated and fully explained in this answer. Neither did this respondent in any sense cause any one or more of those claims to be established and proved in this manner. These claims had all been proved in this cause *among* prior to the time they were bought up by Laura Eichel. As regards having these claims established as first liens on the fund in this cause the respondent had no part in this. The referee had at a general meeting of the creditors, of which the United

States & Fidelity Co. had notice, set this matter for hearing as one of the many things to be considered at that meeting by the creditors, and it was regularly called up for consideration in open meeting, at which meeting, if respondent is not mistaken, the attorney for the United States Fidelity & Guaranty Co. was present, and
197 upon the question as to which of the claims was supposed to be of that class known as material claims, that is to say for material furnished the contractor and used in the actual construction of locks and dams, the bookkeeper of the bankrupt Jacob Eichel, the president of the bankrupt were called upon to state in the form of depositions before the referee such facts in relation thereto as might be within their own personal knowledge.

2. The next charge is that the fact of taking depositions of these officers of the bankrupt in open, public meeting of the creditors held before the referee on due notice to all creditors was a fraudulent act upon the part of this respondent and done with intent to defraud this estate, and to take an unjust advantage thereof and to make a profit out of this trust, which charge respondent says is absolutely false and unfounded.

3. The next charge which is that thereafter this respondent caused these claims to be transferred to the name of Laura Eichel for the purpose of concealing the real interest and ownership therein is absolutely false and unfounded. Respondent has heretofore explained how Laura Eichel became interested in the estate, that she had bought them with money realized from discounting notes in the bank at Evansville, Ind., and such is the truth.

4. The next charge which is that this respondent unlawfully and fraudulently combined and conspired with Jacob Eichel to cheat and defraud the creditors of this estate by using their position and abusing the confidence of the court and creditors by buying up and speculating in the claims and property of this bankrupt estate is absolutely false and unfounded.

5. The next charge which is that this respondent and said Jacob Eichel in the month of March, June and August, 1907, brought suits upon said claims against the United States Fidelity & Guaranty Co. vexatiously and to avoid the jurisdiction of this court in so far as this respondent is concerned, knows or believes absolutely false and unfounded.

And now having answered these specific allegations and charges, made and preferred against the respondent in the petition aforesaid he desires to say that he has never consciously done any act to the detriment or injury of any one interested in this estate. That he has made a full disclosure of his whole connection with this matter and this was done prior to the time this proceeding was instituted against him. That he had never used one dime of the money or prop-
198 erty of this estate for his own purpose or for any other purpose, save that of the administration of this trust, that he was personally the means and cause of raising at least $70,000, which was necessary for the use of this trust by personally obligating himself to that extent. That the United States Fidelity & Guaranty Co. on the other hand has never paid nor caused to be paid one dime to-

ward the completion of said contract or to the so-called preferred creditors, or in any other manner in the administration of this estate, on the contract it has at all times and is now denying its obligation to pay anything on account of its being surety for the bankrupt.

And now having fully answered the rule and petition aforesaid respondent prays to be hence dismissed with his costs in this behalf expended.

M. J. BRAY.

STATE OF WEST VIRGINIA,
U. S. Circuit Court, To wit:

M. J. Bray, being first duly sworn, upon his oath says that he is the respondent named in the foregoing answer; that he has read the allegations thereof, and that the same are true, except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, he believes them to be true.

M. J. BRAY.

Subscribed and sworn to before me this 19th day of November, 1907.

S. R. HARRISON,
Clerk C. C. U. S., N. D. W. Va.

199 *Demurrer of Nicolette Lumber Co.*

(Filed December 2, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, Held at Parkersburg, September 21st, 1907.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee of the Evansville Contract Company; JACOB Eichel and Laura Eichel, The City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and Nicolette Lumber Company.

And now, November 30, 1907, comes the Nicolette Lumber Company, by its attorney, William M. Hall, and demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction, and not generally:

First. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Second. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts brought before the filing of this bill.

Third. The bill is multifarious in that it joins divers defendants having divergent interests and this defendant in particular has no interest particularly common to it and other defendants or any other defendant. Further, the bill joins two and more causes of action against two and more defendants. These causes of action have no connection or common origin and the evidence pertinent to
200 one is wholly impertinent as to the others, and the relief sought as to this defendant is entirely different as to the relief sought as to the other defendants.

NICOLETTE LUMBER COMPANY.
By J. E. LEACH, *Treasurer.*

I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

WM. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana, County of Wood, ss:

J. E. Leach, Treasurer of Nicolette Lumber Company, being duly sworn, says that the above demurrer is not interposed for delay.

J. E. LEACH.

Sworn to and subscribed before me, this 2nd day of December, A. D., 1907.

[SEAL.] M. Q. SHREWSBURY,
Notary Public for Wood County, West Virginia.

My commission does not expire.

Petition of M. J. Bray et al., Trustees.

(Filed December 6, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

To the Honorable George W. Johnson, Referee in Bankruptcy:

Madison J. Bray, C. D. Dotson, and Alfred Heine, Trustees in the above matter, respectfully show the following:

1. That the Evansville Contract Company is a corporation, duly organized under and by virtue of the laws of the State of Indiana,

for the purpose of engaging in the building of locks and dams,
201 and performing general contract work of like kind and character on the Ohio river and its tributaries, and upon other rivers of the United States; that the capital stock of the defendant company is fixed in the article of association at $150,000.00 divided into three thousand shares of the par value of one hundred ($100) dollars per share, of which one hundred and thirty thousand ($130,000.00) dollars has been issued and fully paid, and twenty thousand ($20,000.00) remain in the treasury of the company undisposed of. That within the last year the capital stock of said company has been increased one hundred thousand ($100,000.00) dollars, making the authorized capital stock common of said company, two hundred and fifty thousand ($250,000.00) dollars and an issue of three hundred and fifty thousand ($350,000.00) dollars preferred stock has been authorized, but that no part of said increase, either in common or preferred has been issued.

II. That said company, since its organization in the year 1899 has been engaged in the construction of locks and dams, having Government contracts in the Ohio river and its tributaries and to some extent in other streams, as is more particularly hereinafter set out, and that the work contracted for and performed by said company has been confined exclusively to Government work.

III. In order to enable said company to engage in said work it has been necessary for it to invest a large amount of its capital in the necessary equipment for the performance of said work, and for that purpose it has acquired and has owned a large quantity of personal property situated and adapted exclusively to the performance of said work, which personal property now the assets of said bankrupt is partially and generally described as follows:

One (1) gravel digger; three (3) dredge boats; machinery for two (2) dredge boats; two (2) tow boats; four (4) derrick boats; six (6) barges; one (1) pump boat; three (3) dump scows; three (3) calking flats; two (2) boat bottoms; six (6) skiffs; fifteen (15) hoisting engines; six (6) horse powers; thirteen (13) pumps and engines; fifteen (15) derricks with lines and attachments complete; twelve (12) boilers; one (1) machine shop; three (3) blacksmith shops; one (1) locomotive engine; twenty-five (25) contractors' cars; lot of steel rails and ties; one (1) steam shovel; four (4) steam drills; one (1) electric light plant; one (1) cable way complete for transferring material across rivers; one (1) stone crusher; three (3) iron water tanks; one (1) saw mill; four (4) concrete mixers complete; one
(1) boring machine complete; three (3) orange peel buckets-
202 for dredging; one (1) clam shell bucket for dredging; four (4) mules; three (3) horses; two (2) wagons and harness; three (3) drag scrapers; a large quantity of blocks; chains, lines, picks and shovels, and a large quantity of smaller tools, ropes, implements, appliances and machinery used in said company's various plants.

That said property is situated in the States of Indiana, West Virginia, Pennsylvania, Ohio and South Carolina, and more especially at dams Nos. 2 and 3 near Sewickley, Pa., Lock No. 18, Ohio river,

near Parkersburg, West Virginia, in the States of Ohio and West Virginia, between Pittsburg, Pa., and Parkersburg, W. Va., and on the Congaree river in the State of South Carolina, near Columbia in said State.

That said property is the accumulation of years and comprises several distinct and complete plants fully and suitably equipped for the construction of locks and dams and harbor work; that the same is of great value, and particularly when used in the performance of work of that character; and if not used in work of that character would be worth considerably less.

IV. That during the last five years said company has successfully competed and bid for the construction of a large number of Government locks and dams. That it has fully completed locks 2, 3, 4, and 5 on the Ohio river, between Pittsburg and Beaver in the State of Pennsylvania, parts of dams Nos. 2 and 6 on the Ohio river, and one lock on the Congaree river in the State of South Carolina, involving work altogether to the amount of about $1,750,000.00.

V. That said company has heretofore entered into contracts with the United States Government, and has now under contract and in process of completion the following work:

(*a*) One contract for dredging at dam No. 2, Ohio river, near Coraopolis, in the State of Pennsylvania, involving 90,000 cubic yards of dredging and 5,000 sq. yds. brick paving at a total contract price of $40,000. Of this work there has been done about 20,000 cubic yards dredging, leaving the remainder yet to be completed. Said contract is more particularly set out in certain articles of agreement entered into September 18th, 1902, between Captain W. E. Craighill, Corps of Engineers U. S. A. on behalf of the Government of the United States, and The Evansville Contract Company on behalf of the bankrupt, which was executed by the contracting parties and approved October 11th, 1902, and which contract is hereby referred to as part of this petition. That to complete said
203 work it will require an outlay of about twenty thousand ($20,000) dollars.

On this contract no paving has been done; of the dredging 19,490 cu. yds. has been completed at 39c. per cubic yard, amounting to $7,601.10 of which there has been paid the bankrupt $6,841.00 and percentage retained by the Government amounts to $760.00.

b. Contract for the construction of a section of dam No. 3, on the Ohio river near Sewickley, Pa., at a total contract price of one hundred and fifty thousand ($150,000.00) dollars; that work thereon to the amount of four thousand five hundred ($4,500) dollars has been done, and that said company has on hand timber, steel, stone, iron and other material, prepared and situated for use in this dam to the amount of about thirty thousand ($30,000) dollars and which will to a large extent be useless elsewhere. This work according to contract is required to be completed within one hundred and fifty working days from May, 1904; that it will require about sixty thousand ($60,000) dollars to complete said work, and that if completed according to the terms of the contract, a large net amount of not less than fifty thousand ($50,000) dollars in the way of profits and un-

finished work, for which no estimates has been made by the Government, will be realized therefrom. Said contract is more particularly set out in certain articles of agreement entered into September 19th, 1903, between Wm. L. Sibert, Captain Corps of Engineers, U. S. A., on behalf of the Government of the United States of the one part and The Evansville Contract Company, on behalf of said bankrupt on the other part.

C. Contract for the construction of Lock No. 18, Ohio River, near Parkersburg, W. Va., at a total contract price of $218,000.00; that work on this contract to the amount of about $75,000.00 has been done, that said company has on hand practically all the material required for the completion of this lock, and if same can be completed according to contract a net amount including profits and unestimated and unfinished work of not less than $60,000.00 will be realized thereon and that it will require all of the coming season up to and including December, 1904, to complete this work.

Said contract is more particularly set out in certain articles of agreement entered into by and between Capt. W. E. Craighill, Corps of Engineers, U. S. A., on behalf of the United States Government of the one part and The Evansville Contract Company on behalf of said Bankrupt of the other part, which contract was duly entered
204 into by the parties and approved December 10th, 1902, and which contract is referred to as a part of this petition.

Work on this contract amounting to $75,170.69 has been done, of which $67,653.62 has been paid and percentage of $7,577.07 has been retained by the Government.

Material on hand consisting of iron and timber valued at $4,540.25.

d. Contract for dam on Congaree River, in the State of South Carolina near Columbia in said State, at a total contract price of $67,000.00; that said dam is about finished and can be completed in about 90 working days, and that it will require about the sum of $15,000.00 to complete the same; that when completed said company will be entitled to receive from the Government about $40,000.00.

Said contract is more particularly described in certain articles of agreement entered into October 2nd, 1902, by and between Capt. J. C. Sanford, Corps of Engineers, U. S. A., on behalf of the United States Government of the one part, and The Evansville Contract Company on behalf of said bankrupt of the other part; which said contract was duly entered into by the parties and approved November 6th, 1902. Said contract is referred to as part of this petition.

Work done on this contract amounts to $33,833.15 of which $27,749.83 has been paid the bankrupt and it has retained the percentage of $3,083.32; material on hand valued at $7,118.34 consisting of iron, crushed stone, cement and timber.

VI. That on the 12th day of February, 1904, the said The Evansville Contract Company found itself in embarrassing circumstances, and under and by virtue of the statutes of Indiana made a general assignment for the benefit of all its creditors to Madison J. Bray, Trustee; said Madison J. Bray being then a resident of the City of Evansville, County of Vanderburg and State of Indiana, duly qualified to become such Trustee; that said assignment was duly lodged

in the recorder's office of Vanderburgh County on the 12th day of February, 1904, and by said recorder on said day recorded in record of deeds in the office of said Recorder in Deed Record No. 32, at pages 120, 121 and 122.

VII. That thereafter in the District Court of the United States for the Northern District of West Virginia, upon the petition of certain creditors of the said The Evansville Contract Company, such proceedings were had that on February 27th, 1904, by the consideration of said court, the said The Evansville Contract Company was duly adjudicated a bankrupt.

That thereafter the said The Evansville Contract Company duly filed its schedules according to law, and at the first meeting of creditors of said Bankrupt Company on the 15th day of March, 1904, the undersigned petitioners and trustees were duly elected Trustees of said Bankrupt estate; and that on said 15th day of March, 1904, the said trustees filed their bond in the sum of $75,000.00 with the Citizen's Trust & Guaranty Company of West Virginia as surety thereon, which bond has by the court been duly approved.

VIII. Your petitioners show that the unfinished contracts herein above referred to and described, involve a large amount of work and material, already paid for, and that the completion of said contracts will be for the best interests of the creditors of said estate, and will conserve the assets of said bankrupt, for the reason that an irreparable loss and damage will result for the creditors of said estate unless said contracts can be completed according to their terms and tenor, thus obtaining pay for work done, material used and the profits on said contract, and the contract price for the whole work received therefor from the United States Government.

IX. Your petitioners further show that in order to complete said contracts a large amount of money is necessary to provide for necessary materials and pay-rolls, for labor and the expense of the construction of said work; that there is no money on hand in the assets of the said The Evansville Contract Company; no collateral in the possession of the said The Evansville Contract Company that can be used for raising money and no other means in the control of these trustees by which the necessary money can be raised, except as hereinafter set out and prayed for; that among the assets of said company are a large number of claims against the United States Government, involving nearly $100,000.00; some of which are pending in the Court of Claims at Washington, in the District of Columbia, and some of which are in the course of preparation for presentation to said court and in the hands of counsel of said company specially retained for that purpose.

Your petitioners further show that among the assets of said company is the machinery, tackle and appurtenances necessary for the rebuilding of a dredge-boat; that said dredge boat, in complete working order is a necessary and indespensable adjunct of the necessary work and labor of said contract company in the performance and completion of said contracts; and that it will be cheaper to rebuild

and repair said dredge boat than to hire a dredge boat for the
206 necessary work in said contracts and that it will conserve the assets of said company and be to the best interest of said creditors to repair and rebuild said dredge boat, with the machinery which is now a part of the plant of said The Evansville Contract Company. That the machinery and appliances of said company have been in use for years, and is in and about the various places where said contracts are being performed; that some of said machinery is in need of repair; and is practically useless and valueless unless same can be repaired; that the best interests of said creditors of said estate require that said machinery be repaired so that the work can be completed without the expense of acquiring or hiring new machinery, and that the expense of repairing same and putting same in first class condition for the completion of said work will be cheaper than the purchase or hire of new machinery.

The estimated cost of rebuilding this dredge boat is $6,500.00. Estimated cost of repairing other machinery and appliances of these plants is about $2,000.00.

XI. Your petitioners further show that some of the machinery, derricks and other mechanical appliances belonging to the estate will not be in use by these petitioners during all the time necessary for the completion of said contracts, and that some thereof must at some time remain idle. Your petitioners represent that it would be a saving of expense and a source of income to this estate and to the best interests of said creditors, if at such time when certain of said machinery is not in use for the purpose of completion of these contracts, that these trustees might have authority to rent or lease for said times, for stated compensation such parts of said machinery and appliances as may not be needed at any particular time.

XII. That a retainer of about $500.00 will have to be paid counsel in cash, and as to the residue of their compensation they will receive a percentage of the recoveries, not exceeding 20% thereof.

Said petitioners further show that among the claims now pending before the Court of Claims in Washington, D. C., and those in state of preparation to be presented to said Court of Claims, a large amount of work and technical knowledge and experience is required for their proper preparation, presentation and trial. That the best interests of said estate and the conserving of the assets of said company require that the said claims so pending be with all possible dispatch properly presented and tried; and that the best interests of said creditors and the conserving of the assets of said estate require
that the petitioners have authority to so properly present for
207 trial said claims; and that they have authority and direction from this court to employ and pay counsel, and to do all necessary and incidental things for the proper presentation and preparation and trial of said claim.

XIII. That in the prosecution and completion of said contracts it will be necessary for the best interests of said creditors and the conserving of the assets of said bankrupt that these trustees and petitioners have authority to hire and rent upon the best possible terms, certain machinery and appliances, boats or dredges, and that

it will be cheaper and to the better interests of said creditors to hire such machinery and appliances than to purchase new appliances and machinery.

XIV. Your petitioners further represent that the work of the contract taken by this company since its organization has been under the control and direction of Jacob Eichel, the president of said company, who has been General Manager thereof in the fulfillment of the contracts now on hand; his services in that behalf are necessary and would be to the best interests of said creditors, and would conserve the assets of the bankrupt, and that these petitioners ought to have the power and authority to employ said Jacob Eichel in said behalf.

And your petitioners further assert and represent that the preparation, presentation and trial of the claims of The Evansville Contract Company against the United States Government amounting to about $90,000.00 would be impossible without the aid, assistance and management of said Jacob Eichel, and that the best interests of said creditors require that he be retained by these trustees, not only for the completion of said contracts, but for the proper preparation, presentation and trial of said claims.

XV. Your petitioners further assert and show to the court that it is not only necessary that these trustees and petitioners herein be authorized to do the things hereinbefore set out for the best interests of said creditors and said estate, but that all of said things are necessary for the preservation of the estate of said company.

XVI. The said trustees further represent to the court that Madison J. Bray, one of these petitioners, having by the deed of assignment about referred to, been vested with all the property of said company, duly entered upon the discharge of his duties as such trustee; that said trustee found the property of said bankrupt situated in different parts of the country as hereinbefore described, in danger of
208 being destroyed and lost from want of care; certain of the work in danger of being injured and destroyed by the elements and that he found among the assets of the company no money with which to preserve said property and prevent its parties destruction.

That said trustees for the purpose of preserving said property from the elements and for the purpose of continuing work which was absolutely necessary for the preservation of the work already put in, required certain money for such purposes, and that in order to raise the same the following proceedings were had. On the 20th day of February, 1904, said Madison J. Bray as such trustee filed his petition in the Vanderburgh Circuit Court, Vanderburgh county, Indiana, which court had exclusive jurisdiction of the subject matter to preserve this property for the creditors of said estate, and that certain expenditures be made and that certain money be raised to meet said expenditures; that said petition came up for hearing on said 20th day of February, 1904, and by the consideration of said court an order was entered authorizing and empowering said Madison J. Bray, Trustee, to borrow the sum of $5,000 for such purpose, which order was duly entered in the record of said court in assignment order

book No. 2, which order was never set aside and is in full force; that thereafter the said Madison J. Bray in pursuance of said authority borrowed the sum of $5,000; that thereafter on the 8th day of March, 1904, in further pursuance of said necessity and under the further order of said same court, Madison J. Bray, Trustee, to preserve the estate of said company, it having become necessary to borrow an additional sum of money upon his further petition and by the order of said same court, was authorized and empowered to borrow a further sum of money needed, not exceeding the sum of $10,000 which said order is entered in the record of said court in assignment order book No. 2, and which has never been set aside and is in full force; that each of said orders provide that any sum borrowed should be at the rate of interest not exceeding 6%; that said orders provide that all monies borrowed thereunder should be a first lien on all the assets of said company prior and superior to all other.

That said trustee in pursuance of said orders, borrowed upon trustee's certificates the sum of $10,000 at 6% interest per annum; that $10,000 is the total sum borrowed by said trustee.

And your petitioners further assert and represent that the best interests of the creditors of the estate and the preservation of the estate thereof, require that these trustees be authorized and empowered to take up said certificates issued by said Madison J.
209 Bray, Trustee, and that they be authorized and empowered to borrow a sufficient sum of money, not only to complete said work and to do the things required, as above set out, but sufficient money to pay and take up the amount already borrowed.

XVII. Said petitioners further represent that said Madison J. Bray, Trustee in the said voluntary assignment, will within ten days from date hereof make his report to the Vanderburgh Circuit Court, showing the expenditures by him made under the orders of said court, seek his discharge from said court and the release of his bond and surety therein, and will present his certificate of discharge and his record of his doings under the jurisdiction of that court for the consideration and confirmation of this court.

Wherefore, your petitioners pray:

a. That they may be authorized and empowered to conduct the business of the bankrupt for a limited period and to employ Jacob Eichel, president of such company to assist said trustees in the performance of contracts hereinbefore named.

b. To assist said trustees in the presentation of claims of the said The Evansville Contract Company against the said United States Government.

c. To hire and rent such boats, machinery and appliances as may be necessary for the completion and performance of said contracts.

d. To rent and lease at such times when not needed by said trustees for said times and for stated amounts such part of the machinery, boats and appliances of said company as may not be needed for said times in the performances of the duties of said trustees.

e. To repair whenever necessary the boats, machinery, appliances and work of said company.

f. To repair and rebuild the dredge boat of said company with the machinery which is in and among the assets of said company.

g. To prepare, present and prosecute in the Court of Claims, the claims of The Evansville Contract Company against the United States Government, to employ and pay counsel in that behalf and to do all things necessary for the proper preparation, presentation and prosecution of said claims.

210 *h.* To borrow all sums of money that may be necessary to carry out the objects herein sought at a rate of interest not exceeding 6%; and that said trustees be authorized and empowered to issue trustees' certificates for said sums of money so borrowed; and that said certificates shall be negotiated for loans, and that said loans may be decreed to be first lien upon all property and estate of the said The Evansville Contract Company prior and superior to all other liens.

i. That same trustees be authorized and empowered to take up and pay all certificates issued by said M. J. Bray, Trustee, as hereinbefore set out, and that the certificates issued by these trustees for said payments be declared a first lien prior and superior to all other liens co-ordinate, however, with any certificates issued by these trustees and negotiated for loans to be used in the preservation of the estate and the completion of the said contracts.

(Signed) M. J. BRAY,
C. D. DOTSON,
A. HEINE, *Trustees,*
By PHILIP W. FREY,
J. A. DUPUY, *Attorneys.*

UNITED STATES OF AMERICA,
State of West Virginia, Wood County:

Before me, the undersigned Notary Public, in and for said county and State, personally came the above M. J. Bray, C. D. Dotson and A. Heine, and each made oath that they had read the foregoing petition and the matters and things therein stated are true in substance and in fact.

In witness whereof I have hereunto set my hand and official seal this 17 day of March, 1904.

J. A. DUPUY,
Notary Public.

211 *Bray's Admission and Proposition.*

(Filed December 6, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

To the Hon. A. G. Dayton, Judge of said Court:

The undersigned, Madison J. Bray, who is trustee of the estate of the above named bankrupt hereby offers and tenders to transfer and assign to the clerk of this court, or to the Hon. T. A. Brown, referee or any other person, whom your Honor may designate any and all interests, prospective or otherwise, which he may have, directly or indirectly in the possible profits to be realized upon a certain lot of claims held by Laura Eichel against this bankrupt estate, which claims are referred to in the proceedings instituted recently in this court by The United States Fidelity & Guaranty Co. against the undersigned. The contract between the undersigned and the said Laura Eichel, whereby there is a possible interest to the undersigned in the profits of such claims is referred to in this proceeding. The undersigned excepts, however, from this assignment his right to be re-imbursed the full amount of money, which was actually paid by him as endorser for the said Laura Eichel in the City National Bank of Evansville, Ind., with legal interest thereon from the date he paid the money to said bank, which money was used by said Laura Eichel at the time or times she received it from said bank for the purchase of the claims aforesaid.

The assignment above offered and tendered is to be held by the person to whom your Honor shall designate the assignment to be made for the sole use and benefit of the creditors at large of the estate of the above named bankrupt, who have proven their debts before the referee in this court, and whatsoever sum or sums may be realized under this assignment is to be apportioned between the creditors at large of said estate above referred to in accordance with the provisions of the bankrupt act applicable to any other fund in the hands of the court for disbursement among creditors at large of such bankrupt.

The undersigned is moved to make this assignment because it is now contended by certain parties that however innocently or ignorantly the undersigned may have acted, he, nevertheless
212 in so d-ing violated some policy or principle of the law applicable to fiduciaries when he entered into the business arrangement with Laura Eichel, whereby he was to receive, in compensation for the use and hazard of his money advanced to her, a certain portion of the possible profits arising from the claims she had purchased with the money she had realized in bank upon the endorse-

ment of the undersigned. Before the undersigned did this act, which is now complained of, he had been advised by learned and reputable counsel that in so doing he would not be violating any principle of law applicable to himself as trustee, and the undersigned still believes that the legal opinion of said attorneys is entitled to respect and consideration, however others may differ with them.

But the undersigned not desiring to contend for anything about which there can or may be the slightest doubt in regard to his legal and moral right, or about which there might be the slightest suspicion in regard to his good faith, desires by means of this assignment to turn over to the creditors at large of this estate any and all possible profit which might by any means accrue to him personally by reason of his contract aforesaid with Laura Eichel, and he desires furthermore by this means to make full and free reparation for any wrong, whether real or imaginary he may have done, however, innocently he acted in doing so.

(Signed) M. J. BRAY.

Wheeling, W. Va., Nov. 20, 1907.

Exceptions of the Parkersburg Banks.

(Filed December 6, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT CO., Bankrupt.

To the Honorable George W. Johnson, Referee:

The exceptions and protest of the Farmers & Mechanics National Bank of Parkersburg, a corporation, and the Second National Bank of Parkersburg, a corporation, to the petitions filed in the above entitled proceedings by C. D. Dotson, trustee, Madison J. Bray, trustee, and P. W. Frey and J. A. Dupuy, attorneys for the trustees, which petitions ask for certain allowances.

Thereupon the undersigned exceptors allege that they are materially interested in the funds in the custody, and to be
213 placed in the custody and control of the bankrupt court, in the matter of the Evansville Contract Company, bankrupt, particularly for the following reasons:

That is to say, that soon after the adjudication in bankruptcy, the United States Fidelity & Guaranty Company, the surety of the Evansville Contract Company to the United States Government, on a bond executed by the said Evansville Contract Company on account of its contract for the construction of government locks or dams in the Ohio river.

That the said Guaranty Company required from certain creditors of said contract company, as a condition precedent to the authority of the Trustees in Bankruptcy to proceed with the work of construction for the Government, under the contract with the Government, a bond in the penalty, towit: of $20,000.00, with condition to save harmless the said Guaranty Company with the Government, for what may be designated as preferred claims against the Evansville Contract Company.

And thereupon your exceptors, being led to believe by statements and representations made by the president of the bankrupt company, as well as similar representations made by the now Trustee, M. J. Bray, that it was greatly to the interest of the creditors to cause the work to be proceeded with by the Trustees, they, as co-principals, or sureties, did, in fact, execute the bond aforesaid, and your exceptors are advised that the result of the operation of the said Trustees have not been such as to save harmless the Guaranty Company from loss on the original bond, and so that your exceptors are advised that the Guaranty Company will attempt to enforce the liability on said bond as against your exceptors.

Your exceptors are further advised, and so charge, that the allowances asked for by said Trustees and said attorneys, if allowed, will be necessarily paid out of the funds that would be otherwise applicable to the payment and discharge of the preferred claims aforesaid, upon which said Guaranty Company may be liable, and on account of which the liability will, as exceptors are informed, be sought to be enforced against your exceptors.

Thereupon, your exceptors now allege that they are interested in the preservation of said funds, for their own protection, and as they are advised, have a right here to intervene, and object and except to the petitions and the allowances therein asked for.

And thereupon, for exception to the petition of Madison J. Bray, the *executors*, except to the amount asked for, to-wit, $5,000.00, and as cause of exception allege that there had also been filed a
214 petition by C. D. Dotson, also a Trustee, asking for an allowance of $8,000.00; and there is also an allowance asked for by the attorneys for the said Trustees, to-wit, by P. W. Frey, in the sum of $4,000.00, and for J. A. Depuy, in the amount of $2,700.00, these allowances being in addition to other sums, and making a total aggregate on account of attorneys and the Trustees, $19,700.00.

Your exceptors allege that they are advised that the total assets arising from the sale of the plant of the bankrupt company, and the amount received from the Government on account of work, aggregates $97,000.00. So that the attorneys and the Trustees are asking for practically 25% of the total assets.

These exceptors allege and charge that all the charges and demands made by the said Trustees, and by the attorneys for the said Trustees, are ex*hor*bitant, unconscionable, and not warranted by the bankruptcy law, and that the allowances should not be made, but that the Trustees should be paid the amount of commissions provided for by the bankruptcy law, and that only a reasonable compensation should be allowed to their attorneys.

Your exceptors in this behalf allege that it was distinctly agreed and understood at and before the election of the Trustees, that only one allowance would be charged or asked for, and particularly was this representation made by the said M. J. Bray.

These exceptors therefore pray that this, their exception, may be filed and considered to each of the three petitions; that the prayer thereof be disallowed; that the Trustees be restricted in their charges to the statutory charges under the National Bankruptcy Law, and that the allowance to the attorneys may be disallowed, but a reasonable and fair allowance be made in proportion to the assets that came to the possession of the Trustee.

THE FARMERS & MECHANICAL NATIONAL BANK.
By C. T. HITESHEW, *Cashier.*
THE SECOND NATIONAL BANK.
By G. H. CARVER, *Cashier.*
V. B. ARCHER, *Att'y for Exceptors.*

Endorsed: "Filed Jan. 17, 1906, 10 A. M. Johnson, Referee."

A copy.
Teste:

T. A. BROWN, *Referee.*

Fee for copying 4 pages $2.00. Paid by B. M. Ambler.

215 *Depositions of Wood and Martindale.*

(Filed December 6, 1907.)

In the District Court of the United States for the Northern District of West Virginia.

In Bankruptcy.

In the Matter of THE EVANSVILLE CONTRACT COMPANY, Bankrupt.

At the law offices of Van Winkle and Ambler, No. 306 Juliana street, Parkersburg, West Virginia, June 25th, 1907, in accordance with the annexed notice, on motion of B. M. Ambler, Esq., attorney for the United States Fidelity and Guaranty Company, on account of the absence of witnesses, these depositions are adjourned until Wednesday, July 3rd, 1907, at the same time and place.

_____,
Notary Public, Wood County, W. Va.

At the law offices of Van Winkle and Ambler, No. 306 Juliana street, Parkersburg, West Virginia, July 2nd, 1907, met as per adjournment had herein on June 25th, 1907.

On motion of B. M. Ambler, attorney for the United States Fidelity and Guaranty Company, on account of the absence of witnesses, these depositions are adjourned until Friday, July 5th, 1907, at the same time and place.

____ ____,
Notary Public, Wood County, W. Va.

At the law offices of Van Winkle and Ambler, No. 306 Juliana street, Parkersburg, West Virginia, July 5th, 1907, as per adjournment had herein on July 3rd, 1907.

On motion of B. M. Ambler, attorney for the United States Fidelity and Guaranty Company, on account of the absence of witnesses, these depositions are adjourned until July 16th, 1907, at the same time and place.

____ ____,
Notary Public, Wood County, W. Va.

At the law offices of Van Winkle and Ambler, No. 306 Juliana street, Parkersburg, West Virginia, July 16th, 1907, as per adjournment had herein on July 5th, 1907, and in accordance with
216 the annexed notice, the following depositions were taken before F. H. Mayne, Notary Public, Wood county, West Virginia, and by him transcribed into typewriting.

Mr. Ambler stated that he has inquired by telephone whether any of the parties, or attorneys in interest, can be reached. Mr. Camden notified Mr. Ambler some days ago that he was not authorized to appear for Mr. Bray, or the Eichels or for the Trustee in this matter, and inquiry at Mr. Camden's office this morning shows that he is not at home. Mr. Dotson who is not an attorney but has sometimes attended and represented the receiver, or somebody, was notified by telephone but did not come and none of the other parties could be found.

Appearances: T. A. Brown, Referee in Bankruptcy, B. M. Ambler, representing the United States Fidelity and Guaranty Company.

CHARLES MARTINDALE, a witness of lawful age, being first duly sworn, deposes and says as follows:

Direct examination by B. M. AMBLER, Esq.:

Q. Please state your occupation and residence?
A. I am a lawyer residing at Indianapolis, Indiana.
Q. How long have you been engaged in the practice of law?
A. Twenty-seven years.
Q. What relations, if any, did you have with the United States Fidelity and Guaranty Company in April, 1907?
A. I was the chief counsel in Indiana.
Q. State whether, or not, you are acquainted with M. J. Bray, Trustee in this matter, Charles F. Wood, Chief Engineer of the

United States Fidelity and Guaranty Company, Jacob Eichel, Francis J. Reitz, President of the City National Bank of Evansville?

A. I do not know Jacob Eichel and have never seen him; I have met Madison J. Bray once, at the office of George A. Cunningham in the city of Evansville, Indiana, on April 12th, 1907; I am acquainted with Charles F. Wood, Chief Engineer of the United States Fidelity and Guaranty Company and have known him for several years; I know Francis J. Reitz who is the President of the City National Bank of Evansville.

—. State if you visited Evansville in April, 1907?

A. I did.

Q. In company with whom and for what purpose?

A. I was requested by Mr. Charles F. Wood, Chief Engineer of the United States Fidelity and Guaranty Company to meet him at Evansville, for the purpose of interviewing the Evansville banks which had signed an agreement of indemnity to the United
217 States Fidelity and Guaranty Company, agreeing to hold the last named company harmless against any claims under or by virtue of certain bonds which had been theretofore executed by the United States Fidelity and Guaranty Company to the United States Government to secure the faithful fulfillment of certain contracts entered into by the Evansville Contract Company with the Government of the United States for certain public works in the waters of the United States.

Q. Please state if you are the gentleman who, in April last, made affidavit with regard to a conversation had between yourself and Mr. Wood on the one side and Mr. M. J. Bray and other parties on the other, on the 12th day of April, 1907?

A. I did prepare an affidavit for Mr. Wood to execute and I prepared and executed an affidavit myself stating the substance of what had transpired during the visit to Evansville heretofore referred to; the affidavits were prepared the morning after the 12th of April, I think; certainly, on the 13th sometime.

Q. To what extent did the statement contained in the affidavit prepared by you to be sworn to by Mr. Wood correspond to the facts, as they occurred?

A. The affidavits were true in substance and in fact, as to the averments contained therein and were intended to state the substance of the conversation which took place at the city of Evansville, on the 12th of April, 1907, at the office of George A. Cunningham.

Q. What was your first connection with the affairs of the United States Fidelity and Guaranty Company, in the matter of the Evansville Contract Company?

A. That was my first connection with it; I had no connection with any phase of these matters prior to receiving the request to assist Mr. Wood in Evansville.

Q. On reaching Evansville, with whom did you and Mr. Wood first confer?

A. We went directly to the office of George A. Cunningham, a prominent lawyer of Evansville, Indiana?

Q. What connection had he with the affairs of the United States Fidelity and Guaranty Company?

A. Mr. Cunningham was a director of the City National Bank and its counsel; he had also been retained in various matters for the United States Fidelity and Guaranty Company, and when the original contract of indemnity, which it was proposed should be executed by the creditors of the Evansville Contract Company, to the United States Fidelity and Guaranty Company, was sent to Evansville it was submitted to Mr. Cunningham and Mr. Cunningham passed upon the legality of such an indemnity contract; this was stated by Mr. Cunningham to me in the presence of Mr. Francis J. Reitz, the president of the City National Bank, and Mr.
218 Wood, in our conversation in Mr. Cunningham's office on the 12th of April, and my statement is to the fact as derived from him.

Q. Please state what occurred at that interview?

A. We went to Mr. Cunningham's office and told him that we had come to Evansville for the purpose of ascertaining whether it were possible to arrive at a basis of adjustment of all claims against the Evansville Contract Company and an arrangement of the relationship of the parties and the claims between the parties, in such a manner as a settlement of all of the affairs of the Evansville Contract Company, bankrupt, might be had and all litigation in relation thereto terminated to the mutual profit of everybody concerned; Mr. Cunningham thereupon to some extent reviewed what connection he had had with the matter, stating his relation to the City National Bank and having passed upon the indemnity contract to the Guaranty Company which had been signed by the various Evansville banks, among them the City National; that he had approved the contract as to its legality; during that conversation, he said that his relationship had so changed that it might be necessary for him to attack the legality of the contract; and thereupon Mr. Wood took from the files of the United States Fidelity and Guaranty Company, which Mr. Wood had with him, a signed opinion or communication by Mr. Cunningham to the Guaranty Company approving of the legality of the indemnity agreement; Mr. Cunningham was somewhat amused at the situation in which he found himself and said that he had forgotten that he had written the letter, but that nevertheless his relations to the bank now were paramount and that he thought it likely that the bank had some kind of an indemnity agreement from Madison J. Bray. He called Mr. Francis J. Reitz, the president of the City National Bank, on the telephone—apparently got the bank's office and asked for Mr. Reitz,—and had some conversation over the 'phone with relation to a contract which he had prepared for the bank, between Bray and the bank; he asked Mr. Reitz to bring the contract with him. In a short time Mr. Reitz came to Mr. Cunningham's office and Mr. Cunningham explained to him the purpose of the visit of Mr. Wood and myself. Mr. Reitz said that the subject did not interest the bank for the reason that Madison J. Bray had executed to the banks a contract of indemnity by which he agreed to save them harmless on account of the guarantee which the banks had

signed to the United States Fidelity and Guaranty Company. He had with him that contract of indemnity signed by Bray; it was read over carefully two or three times by Mr. Cunningham and Mr. Reitz in the presence of Mr. Wood and myself (not aloud) and its contents explained to Mr. Wood and myself; it was stated to us that
219 the banks which had signed the guarantee to the United States Fidelity and Guaranty Company rested upon and relied upon that indemnity to them by Madison J. Bray and regarded Mr. Bray as amply good to cover the matter, and therefore, they weren't interested in this matter at all. That was the attitude of Mr. Reitz and Mr. Cunningham at that time, but they took an interest in the matter and thought that what we were seeking was desirable from their point of view and therefore they suggested that we permit them to send for Mr. Bray and Mr. Eichel and have a conversation or conference, there in Mr. Cunningham's office with all of them present.

Q. Please state whether Mr. Bray and Mr. Eichel did come and what occurred?

A. Mr. Cunningham again used the telephone and Mr. Bray, in response to Mr. Cunningham's request, came to the office; Mr. Eichel did not come; Mr. Reitz remained. While we were waiting for Mr. Bray to come, Mr. Cunningham explained that a short time previously he was called into the office of Philip W. Frey, attorney at law, Evansville, Indiana, whose offices are on the same floor of the same building with Mr. Cunningham's offices, and he was consulted with reference to taking employment to assist Mr. Frey in prosecuting claims upon which suits had been filed at Pittsburg, Penna., in the interest of Eichel and Bray; he stated that he was under the impression that Bray was going into the matter, with relation to the suits in Pittsburg, because he had an interest, possibly having furnished money to purchase these claims; enough was said so that I made the inference that Bray had furnished the money to buy these claims. When Mr. Bray arrived Mr. Reitz reviewed the conversation which had taken place, stating to Mr. Bray the purpose of the visit of Mr. Wood and myself; stated the attitude of the banks which had signed the guarantee to the United States Fidelity & Guaranty Company, and held in his hand at the time, I think, the contract of indemnity to the Evansville banks signed by Mr. Bray, and after making this review of the conversation and the situation of the parties suggested that it was desirable to terminate all litigation and close up the matter, if possible. Mr. Bray stated that he didn't see how he could do anything in the matter, that he was Trustee in bankruptcy and could take no steps without an order by the Referee; thereupon, I stated to him quite positively, for I did not wish there should be any misunderstanding on that point, that Mr. Wood and I were not there seeking to have him take any action in his capacity as Trustee in Bankruptcy whatever; that we were there to confer with the Evansville banks and he had been sent for as Madison J. Bray, a private person, and we were discussing the matter with him simply as a private person and not as Trustee
220 in Bankruptcy, and therefore his remark that he couldn't do anything because of his position as Trustee in Bankruptcy was

not pertinent. I thereupon addressed Mr. Bray and said to him "Mr. Bray, what, if any, interest have you in the claims held in the name of Laura J. Eichel?" He stated, in response to the question, that he had furnished the necessary funds to purchase these claims. Mr. Wood then broke into the conversation and said, "Then you are the owner of these claims and you are behind the suits in Pittsburg?" To which Mr. Bray replied, "I suppose I am." The desirability of ending the litigation was again gone into and we pressed that matter from every standpoint we could think of but Mr. Bray did not seem to be interested; he could see only insuperable difficulties in the way, it did not occur to him how such a result could be accomplished; he (Bray) had been advised that the guarantee given by the Evansville banks to the United States Fidelity & Guaranty Company was illegal and not binding and hence no harm could come to him upon his indemnity agreement to the Evansville banks. He was of the opinion, having been so advised by his counsel, that the United States Fidelity and Guaranty Company was liable upon its original bond to the Government of the United States for labor and material entering into the work covered by these contracts; hence, that the claims which he (Bray) had purchased were perfectly good against the United States Fidelity and Guaranty Company for any deficiency remaining after the distribution of the assets in bankruptcy and having purchased these claims at a discount he had a profit in pursuing the course he was taking and did not believe that any settlement could be arrived at unless the Guaranty Company was prepared to admit his proposition of law and make settlement in accordance therewith. That, of course, was impossible and the whole purpose of our visit was thus frustrated.

Q. Did Mr. Bray, in that conversation, state who was the counsel that advised him with regard to the questions of law mentioned?

A. The name of Mr. Philip W. Frey, of Evansville, Indiana, was in the conversation but whether he said directly as to that proposition of law he was depending upon the advice of Mr. Frey, I am not positive.

Q. Did Mr. Bray state how much of the trust funds had been paid to Mr. Frey for such advice?

A. I do not recall that he made any statement on that subject; if he said anything of that kind, it has escaped me.

Q. Did any one call to Mr. Bray's attention what he had testified before that, on the subject of the scheme to throw upon the Fidelity Company the payment of all of the material claims and then
221 apply all of the funds in the hands of the courts to the payment of the claims held by the Trustee personally on speculation, and at the same time repudiate and defeat all obligations under the contracts of indemnity furnished by the banks that had made Mr. Bray's appointment and operations possible.

A. I do not recollect any reference to Mr. Bray's former testimony.

Q. Do you remember the conversation between yourself and Mr. Wood on the one side and Mr. Bray, Mr. Cunningham and Mr. Reitz on the other, and any inquiry made by either of you gentlemen of Mr. Bray as to the moving force in these several proceedings

to take an unjust advantage of the United States Fidelity and Guaranty Company?

A. If you refer to the suits at Pittsburg brought by Laura J. Eichel and the proceedings which had been taking place before the Referee in Bankruptcy, in regard to the marshaling of assets in bankruptcy, there was conversation on that point; Mr. Wood stated to Mr. Bray (evincing a certain amount of surprise at the situation) that it appeared that he (Mr. Bray) was the moving spirit behind these proceedings; that he was the instigator of the suits at Pittsburg and that he was behind the proceeding to marshal the assets in the bankruptcy proceedings favorable to the holder of the material and labor claims, on which suits were being waged at Pittsburg against the United States Fidelity and Guaranty Company, and he (Mr. Bray) stated that he was and made no denial of that situation at all, admitted it.

Q. Did Mr. Bray then state to either of you, as his testimony shows, that he was the person who presented the proposition of indemnity to the Evansville banks and finally got them to sign it?

A. No, I do not think that he mentioned that matter.

Q. Did Mr. Bray, or any other person, show to you, or indicate, the date of the contract under which he agreed to indemnify the Evansville banks, or did any paper you saw indicate the date when Mr. Bray concluded to repudiate the agreement that was made between the banks and the United States Fidelity and Guaranty Company?

A. No, we did not see the paper *now* was the date of it mentioned; the paper was present but objection was made to exhibiting it to us and we did not get to read it.

Q. What relation did Mr. George Cunningham, counsel, bear to the executive power of the City National Bank of Evansville?

A. He is a director and was at the time the contract of indemnity was signed by the bank both a director and its counsel.

And further this deponent saith not.

222 The further taking of depositions is adjourned until 2 30 o'clock P. M.

Notary Public, *Wood Co.*, W. *Va.*

Depositions were resumed at 2 30 o'clock P. M. at the same place. Appearances the same.

CHARLES F. WOOD, a witness of lawful age, being first duly sworn, deposes and says, as follows:

Direct examination by Mr. B. M. AMBLER, Esq.

Q. Please state your occupation and residence?

A. Chief Engineer, United States Fidelity and Guaranty Company; Baltimore, Md.

Q. How long have you been connected with the United States Fidelity and Guaranty Company in that capacity?

A. About eight (8) years.

Q. In a general way, what is the scope of your duties and authority, with regard to matters where your company has become surety for parties under government contracts?

A. Investigating the details of the contract; completing the work when necessary; adjusting claims in connection with the work and in general doing those things which will close the liability and secure the release of the company under its bonds.

Q. Which of the executive officers of your company has had special charge of the matter of the Evansville Contract Company, since the bankruptcy of that company?

A. I have.

Q. You have been examined as a witness once or twice before, I believe.

A. Yes, sir.

Q. Are you acquainted with Charles Martindale, George A. Cunningham, attorney of Evansville, Francis J. Reitz, president of the City National Bank of Evansville, and M. J. Bray, Trustee herein?

A. Yes.

Q. State whether you saw Messrs. Cunningham, Reitz and Bray in April last and if so, where and who was present?

A. On April 12th last I went to Evansville, Indiana, and requested Mr. Martindale, our Indianapolis attorney, to meet me there; the object of my trip being to arrange, if possible, for a compromise with the banks of Evansville who had given us an indemnity agreement, in connection with our suretyship in the Evansville Contract Company matter.

Q. Do you refer to the indemnity agreement dated as I recollect, in April, 1904?

A. Yes, about the first of April, 1904, and on that morning after meeting Mr. Martindale at the hotel, we, by appointment,
223 met Mr. Cunningham at his office in Evansville and after some general discussion of the matter, Mr. Cunningham called in Mr. Reitz, the president of the City National Bank, who is one of the largest indemnitors, and after some discussion of the matter with him and an effort to convince him of the advisability of making some compromise in order to save further trouble and expense, Mr. Reintz informed us (and Mr. Cunningham confirmed it) that they held an indemnity agreement from M. J. Bray, the trustee of the Evansville Contract Company, wherein and whereby Mr. Bray agreed to hold the City National Bank, and other banks as well, harmless from any loss they might have by reason of having indemnified us, and Mr. Reintz said they were not any longer interested in the matter and therefore wouldn't discuss any question of compromise, and that it wouldn't cost them anything even if litigation was prolonged and the expense was run up; it was then suggested we have an interview with Mr. Bray, and it was stated by Mr. Cunningham that he had very close relation with Mr. Bray and had recently been asked to become attorney for Mr. Bray, in con-

nection with certain suits being brought against our company in Pitt-burg; Mr. Cunningham telephoned Mr. Bray and after a short time Mr. Bray came over to Mr. Cunningham's office and we went over the situation about as we had done with Mr. Reitz; we outlined to him the large loss and expense we were all incurring and Mr. Bray took the position that the banks had no liability, under their bonds and he didn't see that it made any difference how much the question was litigated, and after some talk which seemed to indicate that he had more interest in the claims and in the suits than an official interest would give him, the question was put to him, in so many words, what interest he had in the claims and he then said that he had furnished the money to buy them. I then said to him, "then they are your claims and they belong to you for your money bought them," and he said "I guess so," and then I said "you are the power behind all of this trouble," and he said yes, I guess so, or something like that; I asked him to outline from his standpoint just what his position was and he said I am sort of a "poo-bah" in this arrangement and seem to be on all sides of it and I do not just know what all my rights are, but when I pressed him to make some expression of opinion as to the advisability of a compromise, he fell back on his official position and said he was under the orders of the court and couldn't make any compromise; couldn't do anything but carry out the orders of the court; we then tried to impress upon him (Mr. Martindale particularly) that we were not dealing with him as an officer of the court but trying to adjust with certain indemnitors a certain question which was between us with a
224 view of stopping expense, and that our conversation with him was entirely a matter of his personal interest in these claims.

Q. When you speak of Mr. Bray as having indemnified the Indiana banks, do you mean to say he did so as trustee, or in his individual capacity?

A. I understand he did so in his individual capacity; I did not see the agreement; Mr. Reitz had the agreement, which he held in his hands and said it was the agreement Mr. Bray had entered into, but he didn't appear to say very much. I gathered from the conversation that Mr. Bray was speculating in the claims.

Q. Why can you not state any of the particulars, with regard to the contents of that paper?

A. Because he didn't show it to me.

Q. Do you remember sending to me, in April, 1907, an affidavit to be filed in this matter covering the facts of what occurred at the time you refer to?

A. Yes, sir, I sent such a paper, which was written immediately after leaving Mr. Cunningham's office, and while I have stated substantially what occurred, the actual language is practically set down in that paper as near as I could remember it from the conversation and write it down.

Q. Are you able to state to what extent the statements contained in that affidavit agree with the facts?

A. The statements made there agree with all of the known con-

ditions and with everything else which have developed both here and at Pittsburg.

Q. My question is, state whether or not, the matters contained in the affidavit were true as they occurred?

A. Oh, they were true; that is an exact statement of the conversation which Mr. Martindale and myself had with Mr. Bray.

Q. You have referred to some suits brought in Pittsburg, I wish you would state, in a general way, what the nature of these suits was?

A. They are suits for labor and material furnished to the Evansville Contract Company, in connection with certain items of work on the Ohio River, on which this company is surety and were brought in the name of the United States for the use of the parties who furnished the labor and material and assigned from several other parties to Laura J. Eichel and are the same claims, under the same names and for the same amounts as have heretofore appeared in the bankruptcy proceedings, under the head of preferred claims, being those who have been mentioned from the beginning as having recourse on the surety.

Q. State, in a general way, if you know, whether defense is being made by the United States Fidelity and Guaranty Company in Pittsburg?

225 A. Defense is being made vigorously and recently, within a few days, the court has dismissed a rule for judgment on behalf of the plaintiff.

Q. This, in effect, is a requirement that the cases shall be heard on their merits, I believe?

A. Yes, sir, as I understand Pennsylvania procedure.

Q. A petition has been filed herein, in this cause, on behalf of the United States Fidelity and Guaranty Company, for certain premiums on bonds given by your company and which have remained in force pending the trusteeship—it has been suggested that some of these claims there made for premiums were not correct charges because the work had been completed and liability had ceased—if they should be allowed premiums only up to the time that the several jobs were finished, please state the amounts that would be due for premiums and on what bonds?

A. Dam #18, Ohio River, Bond 230,229 Nov. 2 /03 to Nov. 21 /04, $450.00; Dam #18, Ohio River, Bond 230,229, Nov. 21 /04 to Nov. 2 /05, $450.00; Dam No. 3, Ohio River, Bond 236,839, Sep. 19 /04, to Sep. 19 /05, $250.00, making a total of $1,150.00.

Q. Please state whether, or not, any part of these premiums has been paid or any satisfaction given on account thereof?

A. None.

Q. In addition to the items you have mentioned they have made claim, by petition, for the following: Lock No. 2 Big Sandy River, Bond 94,682, Nov. 13 /03 to Nov. 13 /04, $200.00; Dam #18, Ohio River, Bond 230,229, Nov. 21 /05 to Nov. 21 /06, $450.00; Dam No. 3, Ohio River, Bond 236,839, Sep. 19 /05 to Sep. 19 /06, $250.00; Congaree River, Bond 229,788, Oct. 2 /04 to Oct. 2 /05, $150.00, and Congaree River, Bond 229,788, Oct. /05 to Oct. /06, $150.00.

making $1,200.00 in addition to the above, please state whether, or not, any of the premiums last named amounting to $1,200.00 have been paid?

A. They have not.

Q. Please state whether, or not, the bonds mentioned have been, in any manner, released?

A. The statement from which all of these items were taken was made up at my request by our Pittsburg Agent, showing the debits for premiums against the Evansville Contract Company appearing on his books since the date of the last payment and including all items up to the date when the statement was made (Nov. 15, 1906). The Pittsburg Agent not having any knowledge as to when certain of these contracts had been finished, and according to our usual practice the premium charge being cancelled by the completion of the work, when this statement came to me, I ran a pencil through the items amounting to twelve hundred dollars ($1,200.00)
226 above referred to as having been made for a period subsequent to the completion of the contracts by the trustee in bankruptcy.

Q. Have you that statement and if so, will you file it as Exhibit C. F. W. No. 1000 with your deposition?

A. I have it and will file it with my deposition to be so marked.

Statement referred to was produced and filed as Exhibit C. F. W. No. 1000.

Q. Are you able to state whether the charge of $1,150.00 with interest from the time of the maturity of the respective amounts constituting it, would represent the premiums due to your company reckoned as to the dates when the work was finished?

A. Yes, sir, they are.

Q. When is the first time that you got any information from Mr. Bray, or from any other person, that he had undertaken to indemnify any of the banks that had given to your company an indemnity under the paper of April, 1904?

A. On April 12th, 1907, from Mr. Reitz, President of the City National Bank of Evansville, Indiana.

Q. During these three years, between the time that the banks gave you that indemnity and the statement made to you by Mr. Bray at Evansville in April, 1907, what knowledge or notice, if any, did you have that Mr. Bray himself had furnished the means for buying in and controlling the several claims about which Jacob Eichel and himself had theretofore testified?

A. I never dreamed of such a thing and listened with amazement to Mr. Bray's statement. I had often wondered where Mr. Eichel, in view of his personal bankruptcy, secured the funds to purchase all of these claims.

Q. When did it first come to your knowledge that Mr. Bray was in a position where he was interested in the sales of the property made by himself and others as trustee; I mean the property belonging to the Evansville Contract Company.

A. On April 12th, at Evansville; I went to Evansville supposing

I was to enter into negotiations and deal with certain banks who had become indemnitors to us and my object was to try and reach some compromise agreement which would be satisfactory to all, and I found that everywhere I turned I came up against Mr. Bray; I was unable to get around him or away from him or have any negotiations or deal with anybody except Mr. Bray.

Q. State whether or not, in your presence in April, 1907, anything was said about the employment by Mr. Bray of Mr. Cunningham, as counsel?

A. Mr. Cunningham told Mr. Martindale and myself just only a few days previous to that time that he had been approached
227 by Mr. Bray and Mr. Eichel to meet Mr. Frey, their attorney, to become associated as counsel for them in the suits which were being brought against us at Pittsburg, in the name of Laura J. Eichel.

And further this deponent saith not.

——— ———.

STATE OF WEST VIRGINIA,
County of Wood, To wit:

I, F. H. Mayne, a Notary Public within and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above named Charles Martindale and Charles F. Wood, were by me first severally sworn to testify to the truth, the whole truth and nothing but the truth; that the foregoing depositions were taken by me in shorthand writing, the shorthand notes being signed by the witnesses respectively in my presence, and said notes were subsequently transcribed by me into typewriting and forwarded to the respective witnesses for their signatures, and the same were returned duly signed, as shown by letters attached thereto; and I further certify that said depositions were taken by me at the time and place in the annexed notice specified and continued from day to day as above set forth.

Given under my hand this 2nd day of August, 1907.

——— ———,
Notary Public, Wood County, W. Va.

Decree Overruling Demurrers and Awarding Injunction.

At a Circuit Court of the United States for the Northern District of West Virginia, continued and held at Parkersburg, in said District, on the 18th day of January, 1908, the following order was made and entered of record, to-wit:

In Equity.

UNITED STATES FIDELITY & GUARANTY CO.
vs.
M. J. BRAY, Trustee, and Others.

The court having duly considered the several demurrers, and the motions to dismiss the bill and to dissolve and vacate the restrain-

ing order heretofore awarded, and the motion of the complainant to award an injunction as prayed by the bill, and the court having heard the arguments of counsel and considered the briefs
228 filed, and the matters arising upon the record, it is now ordered, adjudged and decreed that the motions to dismiss the bill, and the motions to dissolve and vacate the restraining order heretofore awarded; and each of the demurrers filed by the several defendants be and the same are all overruled; that the court refuses to dismiss the bill or to vacate the said restraining order, upon the motions aforesaid.

It is further ordered, adjudged and decreed that the defendants who have demurred, and each of them, and any and all other defendants, are allowed to file answers, within sixty days from this date, to the complainant's bill, and within that time to interpose such other defense as they may be advised.

And on motion of the complainant, it is further adjudged, ordered and decreed by the court, that Jacob Eichel, M. J. Bray and Laura Eichel, their agents, servants and attorneys, and each of them, be and are hereby enjoined, inhibited and restrained, until the further order of the court, from instituting, prosecuting or maintaining any actions or suits mentioned in the bill as pending in the State of Pennsylvania, and from instituting any other action or actions against the United States Fidelity & Guaranty Co. on account of any claim or claims arising out of its suretyship on any bond or bonds given by said Complainant Company as surety for the Evansville Contract Company, mentioned in the bill in this cause.

It is further ordered, adjudged and decreed, that this decree is without prejudice to any proceedings in bankruptcy, and shall not be construed as preventing or interfering with any proceedings in bankruptcy in the matter of Evansville Contract Company, bankrupt, before Honorable Thos. A. Brown, Referee, or in the District Court of the United States for this District; and the proceedings in this cause shall not, until further order, in any way interfere with the administration of the affairs and assets of said bankrupt, by the said District Court of the Northern District of West Virginia, or by the referee aforesaid.

And the complainant moved the court that the complainant be permitted to amend his bill by making M. J. Bray a defendant in his own right as well as by the description of trustee, and it is allowed according to the motion aforesaid.

The order of injunction shall take effect upon the complainant or some one for it, entering into a bond with security to be approved by the court in the penalty of ten thousand dollars and conditioned to pay all costs and damages that may be allowed by the court or sustained by any person in case said injunction be dissolved.

229 *Injunction Bond.*

(Filed Feb. 18, 1908.)

Know all men by these presents, that the Citizens Trust and Guaranty Company of West Virginia is held and firmly bound unto

Jacob Eichel, M. J. Bray and Laura Eichel in the sum of ten thousand dollars, to the payment of which it binds itself and successors firmly by these presents.

Sealed with its corporate seal and dated this 15th day of February, 1908.

The condition of the above obligation is such, that whereas the United States Fidelity and Guaranty Company, a corporation under the laws of the State of Maryland, and as such a citizen of and a resident in the State of Maryland, having filed on the chancery side of the Circuit Court of the United States for the Northern District of West Virginia, a bill against the said M. J. Bray and others, and having, on the 18th day of January, 1908, obtained an allowance of an injunction against the said M. J. Bray, Jacob Eichel and Laura Eichel, as prayed for in said bill from said court:

Now if the said The United States Fidelity and Guaranty Company, shall pay all costs and damages that may be allowed by the court or sustained by any person in case said injunction be dissolved, then this obligation to be void, else to remain in full force.

CITIZENS TRUST & GUARANTY CO OF W. VA., [SEAL.]
By W. G. PETERKIN, *Pres.*

Attest:
J. H. KNAPP, *Sec'y.*

Acknowledged before the subscriber this 15th day of February, 1908.

S. R. HARRISON, *Clerk.*

Approved:
ALSTON G. DAYTON,
Judge U. S. Dist. Ct., N. D. W. Va.

230 *Petition for Appeal of Laura and Jacob Eichel and M. J. Bray.*

(Filed Feb. 12th, 1908.)

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, et al.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of West Virginia:

The petition of Laura Eichel, Jacob Eichel and M. J. Bray, of the defendants herein, respectfully shows:

That your petitioners, the above named defendants, feeling aggrieved by the decree of the court made on the 18th day of January,

1908, enjoining your petitioners from instituting, prosecuting and maintaining any suit or actions against the complainant in this case, hereby appeal therefrom to the United States Circuit Court of Appeals for the Fourth Circuit for the reasons specified in the assignments of error which are filed herewith, and pray that a citation may be granted, directed to the above named complainant, commanding it to appear before the said Circuit Court of Appeals to answer this appeal; and further pray that a transcript of the pleadings, proceedings, proofs, exhibits and all documents and papers and records relating to the granting of said decree, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit for a review thereof.

LAURA EICHEL,
JACOB EICHEL,
By Their Att'y, WM. M. HALL.
M. J. BRAY,
By His Atty's, J. A. DUPUY AND
WM. M. HALL.

231 *Assignments of Error of M. J. Bray, Jacob Eichel and Laura Eichel.*

(Filed Feb. 12th, 1908.)

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, et al.

And now, February 12th, 1908, come M. J. Bray, Jacob Eichel and Laura Eichel, defendants in the above entitled case, by their attorney, William M. Hall, and file with their petition for appeal the following assignments of errors, saying that in the records and proceedings of said Circuit Court of the United States for the Northern District of West Virginia, in the above entitled cause, there is manifest error in the order and decree of the said court in this, to-wit:

First. The court erred in overruling the motion of defendants Jacob Eichel and Laura Eichel to dismiss the bill of complaint in this case.

Second. The court erred in overruling the motion of defendants Jacob Eichel and Laura Eichel to dissolve and vacate the restraining order and injunction theretofore granted in this case.

Third. The court erred in overruling the demurrer filed by defendant Jacob Eichel—said demurrer being a special one to raise the question of the jurisdiction of the court.

Fourth. The court erred in overruling the demurrer filed by defendant Laura Eichel—said demurrer being a special one to raise the question of the jurisdiction of the court.

Fifth. The court erred in overruling the demurrer filed by the defendant M. J. Bray—said demurrer being a special one to raise the question of the jurisdiction of the court.

Sixth. The court erred in enjoining and restraining Jacob Eichel, M. J. Bray and Laura Eichel, their agents, servants and attorneys and each of them, from instituting, prosecuting or maintaining any action or suits mentioned in the bill as pending in the State of Pennsylvania, and from instituting any other action or actions against the United States Fidelity & Guaranty Company on account
232 of any claim or claims arising out of its suretyship on any bond or bonds given by said United States Fidelity & Guaranty Company as surety for the Evansville Contract Company mentioned in the bill in this case.

WM. M. HALL,
Att'y for M. J. Bray, Laura Eichel, and Jacob Eichel.

J. A. DUPUY,
Per WM. M. HALL,
Att'y for M. J. Bray.

Acceptance of Plaintiff of Surety and Amount in Appeal Bond.

(Filed Feb. 12th, 1908.)

In the Circuit Court of the United States for the Northern Division of West Virginia.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, et al.

And now, February —, 1908, I acknowledge to have received information from William M. Hall, solicitor for defendants, of the intention of defendants to appeal to the Circuit Court of Appeals from the decree of the Circuit Court for the Northern District of West Virginia, made January 18th, 1908, and that an appeal bond in $1,000 with C. D. Dotson as surety will be offered for approval to the Judge of the Circuit Court. I have no objection to said surety or the amount of the bond.

B. M. AMBLER,
Attorney for Plaintiff.

Bond of M. J. Bray, Jacob Eichel and Laura Eichel in Appeal.

(Filed Feb. 12th, 1908.)

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

THE UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, and Others.

Know all men by these presents, that we, M. J. Bray, Jacob Eichel and Laura Eichel, and C. D. Dotson, of Parkersburg, West
233 Virginia, surety, are held and firmly bound unto the United States Fidelity and Guaranty Company, the above named

plaintiff, in the sum of one thousand dollars ($1,000.00) to be paid to the said plaintiff, its successors or assigns, as its interests may appear; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 12th day of February, 1908.

Whereas, lately at a Circuit Court of the United States for the Northern District of West Virginia in a suit depending in said court between The United States Fidelity and Guaranty Company, complainant, and M. J. Bray, trustee, and others, a decree was rendered against all of the defendants on the eighteenth day of January, 1908, and the said M. J. Bray, Jacob Eichel and Laura Eichel have prosecuted their appeal to the United States Circuit Court of Appeals for the Fourth Circuit to reverse the said decree rendered by the Circuit Court of the United States for the Northern District of West Virginia:

Now, therefore, the condition of this obligation is that if the above named M. J. Bray, Jacob Eichel and Laura Eichel shall prosecute their appeal to effect and answer all costs and damages that may be adjudged or awarded against them if they shall fail to make said plea good, then this obligation to be void; otherwise to remain in full force.

M. J. BRAY. [SEAL.]
By His Atty. in Fact, WM. M. HALL. [SEAL.]
LAURA EICHEL. [SEAL.]
By Her Atty. in Fact, WM. M. HALL. [SEAL.]
JACOB EICHEL. [SEAL.]
By His Atty. in Fact, WM. M. HALL. [SEAL.]
C. D. DOTSON. [SEAL.]

Signed, sealed and delivered in the presence of:
As to Hall and his constituents:
R. C. BILY,
J. A. GRIFFIN.

234 February 12th, 1908, within bond approved; no additional bond required to be filed.

ALSTON G. DAYTON, *Judge.*

Petition for Appeal of M. J. Bray et al.

(Filed Feb. 12th, 1908.)

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY,
vs.
M. J. BRAY, Trustee, et al.

To the Honorable the Judges of the Circuit Court of the United States for the Northern District of West Virginia:

The petition of Laura Eichel, Jacob Eichel, M. J. Bray, M. J. Bray, Trustee; The City National Bank of Evansville, Indiana, a

corporation; the Citizens National Bank of Evansville, Indiana, a corporation; the First National Bank of Evansville, Indiana, a corporation; the First National Bank of Rockport, Indiana, a corporation; the Farmers Bank of Rockport, Indiana, a corporation; the Farmers & Mechanics National Bank of Parkersburg, West Virginia, a corporation; and the Second National Bank of Parkersburg, West Virginia, a corporation, of the defendants herein, respectfully shows:

That your petitioners, the above named defendants, feeling aggrieved by the decree of the court made on the eighteenth day of January, 1908, inter alia enjoining certain of your petitioners from instituting, prosecuting and maintaining any suit or actions against the complainant in this case, hereby appeal therefrom to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignments of error which are herewith filed, and pray that a citation may be granted, directed to the above named complainant, commanding it to appear before the said Circuit Court of Appeals to answer this appeal; and further pray that a transcript of the pleadings, proceedings, proofs exhibits, and all documents and papers and records relating to the granting of said decree
235 duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit for a review thereof.

LAURA EICHEL,
JACOB EICHEL,
M. J. BRAY,
M. J. BRAY, *Trustee*,
THE CITY NATIONAL BANK OF EVANSVILLE, INDIANA,
THE CITIZENS NATIONAL BANK OF EVANSVILLE, INDIANA,
THE FIRST NATIONAL BANK OF EVANSVILLE, INDIANA,
THE FARMERS BANK OF ROCKPORT, INDIANA, AND
THE FIRST NATIONAL BANK OF ROCKPORT, INDIANA,
By WM. M. HALL, *Their Attorney*.
FARMERS & MECHANICS NATIONAL BANK OF PARKERSBURG, WEST VIRGINIA, AND
THE SECOND NATIONAL BANK OF PARKERSBURG, WEST VIRGINIA,
By V. B. ARCHER, *Their Attorney*.

Assignments of Error of M. J. Bray, M. J. Bray, Trustee, et al.

(Filed Feb. 12th, 1908.)

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, et al.

And now, February 12th, 1908, come M. J. Bray, M. J. Bray, Trustee; Jacob Eichel, Laura Eichel, the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana; the Farmers Bank of Rockport, Indiana; the Second National Bank of Parkersburg, West Virginia,
236 and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, defendants in the above entitled case, by their attorneys, V. B. Archer and William M. Hall, and file with their petition for appeal the following assignments of errors, saying that in the records and proceedings of said Circuit Court of the United States for the Northern District of West Virginia, in the above entitled cause, there is manifest error in the order and decree of the said court in this, to-wit:

First. The court erred in overruling the motion of defendants, Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana, the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana; and the Farmers Bank of Rockport, Indiana, to dismiss the bill of complaint in this case.

Second. The court erred in overruling the motion of defendants Jacob Eichel, Laura Eichel, the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana, and the Farmers Bank of Rockport, Indiana, to dissolve and vacate the restraining order and injunction theretofore granted in this case.

Third. The court erred in overruling the demurrers filed by defendants Jacob Eichel, Laura Eichel, M. J. Bray, Trustee, the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana; the Farmers & Mechanics National Bank and Second National Bank of Parkersburg; and the Farmers Bank of Rockport, Indiana—said demurrers being special to raise the question of the jurisdiction of the court.

Fourth. The court erred in enjoining and restraining Jacob Eichel, M. J. Bray and Laura Eichel, their agents, servants, and attorneys, and each of them, from instituting, prosecuting or maintaining any action or suits mentioned in the bill as pending in the State of Pennsylvania, and from instituting any other action or actions against

the United States Fidelity & Guaranty Company on account of any claim or claims arising out of its suretyship on any bond or bonds given by said United States Fidelity & Guaranty Company as
237 surety for the Evansville Contract Company mentioned in the bill in this case.

WM. M. HALL,
Atty. for Jacob Eichel, Laura Eichel, M. J. Bray, M. J. Bray, Trustee; The City National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; and the Farmers Bank of Rockport, Indiana.

J. A. DUPUY,
Atty. for M. J. Bray, and M. J. Bray, Trustee, per Wm. M. Hall.

V. B. ARCHER,
Atty. for the Farmers and Mechanics National Bank and Second National Bank of Parkersburg, W. Va., per Wm. M. Hall.

Bond in Appeal.

(Filed Feb. 12th, 1908.)

In the Circuit Court of the United States for the Northern District of West Virginia.

In Equity.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, et al.

Know all men by these presents, that we, M. J. Bray, M. J. Bray, Trustee; Jacob Eichel, Laura Eichel; the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana; the Farmers Bank of Rockport, Indiana; the Second National Bank of Parkersburg, West Virginia, and the Farmers & Mechanics National Bank of Parkersburg, West Virginia; and C. D. Dotson, of Parkersburg, West Va., surety, are held and firmly bound unto The United States Fidelity & Guaranty Company, the above named plaintiff, in the sum of one thousand dollars ($1,000.00), to be paid to the said plaintiff, its successors or assigns, as its interests may appear; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 12th day of February, 1908.

738 Whereas, lately at a Circuit Court of the United States for the Northern District of West Virginia, in a suit depending in said court between The United States Fidelity and Guaranty Company, complainant, and M. J. Bray, trustee, and others, a decree was rendered against all of the defendants on the eighteenth day of January, 1908, and the said M. J. Bray, M. J. Bray, Trustee; Jacob Eichel, Laura Eichel, the City National Bank of Evansville, Indiana, the First National Bank of Evansville, Indiana, the Citizens National Bank of Evansville, Indiana, the First National Bank of Rockport, Indiana, the Farmers Bank of Rockport, Indiana; the Second National Bank of Parkersburg, West Virginia; and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, have prosecuted their appeal to the United States Circuit Court of Appeals for the Fourth Circuit to reverse the said decree rendered by the Circuit Court of the United States for the Northern District of West Virginia:

Now, therefore, the condition of this obligation is that if the above named M. J. Bray, M. J. Bray, Trustee; Jacob Eichel, Laura Eichel, the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana; the Farmers Bank of Rockport, Indiana; the Second National Bank of Parkersburg, West Virginia; and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, shall prosecute their appeal to effect and answer all costs and damages that may be adjudged or awarded against them if they shall fail to make said plea good, then this obligation to be void; otherwise to remain in full force.

M. J. BRAY, *Trustee*. [SEAL.]
M. J. BRAY. [SEAL.]
JACOB EICHEL. [SEAL.]
LAURA EICHEL. [SEAL.]
CITY NATIONAL BANK OF EVANSVILLE, INDIANA. [SEAL.]
CITIZENS NATIONAL BANK OF EVANSVILLE, INDIANA. [SEAL.]
THE FIRST NATIONAL BANK OF EVANSVILLE, INDIANA. [SEAL.]
THE FIRST NATIONAL BANK OF ROCKPORT, INDIANA. [SEAL.]
FARMERS BANK OF ROCKPORT, INDIANA. [SEAL.]

All by Their Atty. in Fact,
WM. M. HALL. [SEAL.]

239 Signed, sealed and delivered in the presence of:

As to Hall and his constituents:
MRS. MARGARET E. VOELKER.

SECOND NATIONAL BANK OF PARKERSBURG, WEST VIRGINIA, [SEAL.]
FARMERS & MECHANICS NATIONAL BANK OF PARKERSBURG, WEST VIRGINIA, [SEAL.]
By V. B. ARCHER, [SEAL.]
Their Att'y in Fact.

As to V. B. Archer, Att'y in Fact:
J. A. GRIFFIN.

C. D. DOTSON. [SEAL.]

J. A. GRIFFIN.

February 12th, 1908, within bond approved; no additional bond required to be filed.

ALSTON G. DAYTON, *Judge.*

Order Allowing Appeal.

And at another day, to-wit: On the 12th day of February, 1908, the following order was made and entered of record, to-wit:

In Equity.

UNITED STATES FIDELITY & GUARANTY COMPANY
vs.
M. J. BRAY, Trustee, et al.

And now, February 12th, 1908, there is presented to me the petition of Laura Eichel, Jacob Eichel, and M. J. Bray, praying for the allowance of an appeal from the order and decree of the Circuit Court of the United States for the Northern District of West Virginia; and petition of M. J. Bray, M. J. Bray, Trustee; Jacob Eichel, Laura Eichel; the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; the First National Bank of Rockport, Indiana; the Farmers Bank of Rockport, Indiana; the Sec-
240 ond National Bank of Parkersburg, West Virginia, and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, making like prayer, each petition being accompanied by assignments of error and by a bond in the sum of one thousand dollars ($1,000.00) with C. D. Dotson, of Parkersburg, West Virginia, as surety:

It is now ordered that appeals as prayed for be allowed and that the assignments of error filed herewith be made part of the record in this cause; that each of the aforesaid bonds be approved, and that

the clerk certify the record in accordance with the prayers of the petitions for appeal, and that all further proceedings in this court in this cause are hereby stayed during the pendency of the appeal.

ALSTON G. DAYTON, *Judge*.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The United States Fidelity & Guaranty Company, a Corporation; Riter-Conley Company, a Corporation, and Nicolette Lumber Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 18th day of March, next, pursuant to an appeal from a decree of the Circuit Court of the United States for the Northern District of West Virginia, in your favor passed in a cause in said court wherein The United States Fidelity & Guaranty Company, a corporation, is complainant, and M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Co., bankrupt; Jacob Eichel, Laura Eichel, City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana; Farmers Bank of Rockport, Indiana; Second National Bank of Parkersburg, West Va.; Farmers & Mechanics National Bank of Parkersburg, West Va.; Riter-Conley Company, and Nicolette Lumber Company, are defendants, to show cause, if any there be, why the decree rendered against the said defendants in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

241 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of February, in the year of our Lord, one thousand nine hundred and eight.

ALSTON G. DAYTON,
Judge U. S. Dist. Ct., N. D. W. Va.

Due and legal service of the within is hereby accepted. Feb. 24, 1908.

RITER-CONLEY MFG. CO.,
By REESE BLIZZARD, *Att'y.*

Feby. 25, 1908, service of the within citation accepted for Nicolette Lumber Company.

WM. M. HALL,
Att'y of Record for The Nicolette Lumber Co.

Service accepted for United States Fidelity & Guaranty Company, March 7, 1908.

B. M. AMBLER,
Counsel for U. S. Fidelity & Guaranty Co.

Decree Extending Time for Filing Record.

And at another day, to-wit: On the 18th day of March, 1908, the following order was made and entered of record, to-wit:

In Equity.

THE UNITED STATES FIDELITY & GUARANTY CO.
vs.
M. J. BRAY, Trustee, et al.

It appearing to the court that on the 12th day of February, 1908 appeals were allowed to certain of the defendants in this cause; and it further appearing that citation issued thereon is returnable in the United States Circuit Court of Appeals for the Fourth Judicial Circuit on the 18th day of March, 1908; and it further appearing from the statement of the clerk of this court that it is impracticable to complete the transcript of the record in this cause in time to have the same filed in the appellate court on the 18th day of March, 1908, it is ordered that the time for the filing of said transcript of record in this cause in said Circuit Court of Appeals be extended until the tenth day of April, 1908.

242 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of West Virginia, ss:

I, S. R. Harrison, Clerk of the Circuit Court of the United States for the Northern District of West Virginia, hereby certify that the foregoing is a true transcript of the record and proceedings of said court in the equity cause of United States Fidelity & Guaranty Company v. M. J. Bray, Trustee, et al., therein pending.

In testimony whereof, I have hereunto set my hand, and the seal of said court, at Parkersburg, in said district, this 31st day of March 1908.

[SEAL OF COURT.] S. R. HARRISON,
Clerk C. C. U. S., N. D. W. Va.

243 And on the same day, to-wit; on April 6, 1908, the appearance of William M. Hall, J. A. Dupuy and V. B. Archer for the appellants is entered, order filed.

Afterwards, to-wit; on April 10, 1908, the appearance of B. M. Ambler for the appellees is entered, order filed.

Motions of Appellants to Advance Cause on Argument Docket.

Filed April 17, 1908.

In the United States Circuit Court of Appeals, Fourth Circuit.

No. —. 1908.

M. J. BRAY, Trustee, et al., Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY.

And now, April 23d, 1908, comes J. A. Dupuy, Attorney for M. J. Bray, Trustee, appellants in the above entitled cause, and shows to the Court that this is an appeal from an interlocutory order and decree of the Circuit Court of the United States for the Northern District of West Virginia, in Equity, granting an injunction against these appellants, as will appear by the record, and moves the Court to place and advance this cause at the head of the next
244 argument calendar, so, that the same shall have and take precedence in this Court, in accordance with the Act of Congress approved the third day of March, 1891, as amended by the Act approved the sixth day of June 1900, and the Act approved the fourteenth day of April, 1906.

J. A. DUPUY,
Attorney for M. J. Bray, Trustee.

In the United States Circuit Court of Appeals, Fourth Circuit.

No. —. 1908.

M. J. BRAY, Trustee, et al., Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY.

And now, April 16, 1908, comes William M. Hall, Attorney for Jacob Eichel, Laura Eichel, City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana, and Farmers Bank of Rockport, Indiana, appellants in the above entitled cause, and shows to the Court that this is an appeal from an interlocutory order and decree of the Circuit Court of the United States for the Northern District of West Virginia, in Equity, granting an injunction against these appellants, as will
245 appear by the record, and moves the Court to place and advance this cause at the head of the next argument calendar, so that the same shall have and take precedence in this Court, in accordance with the Act of Congress approved the third day of

March, 1891, as amended by the Act approved the sixth day of June, 1900, and the Act approved the fourteenth day of April, 1906.

WM. M. HALL,
Attorney for Jacob Eichel, Laura Eichel, City National Bank of Evansville, Indiana; First National Bank of Evansville, Indiana; Citizens National Bank of Evansville, Indiana; First National Bank of Rockport, Indiana, and Farmers Bank of Rockport, Indiana.

In the United States Circuit Court of Appeals, Fourth Circuit.

No. —. 1908.

M. J. BRAY, Trustee, et al., Appellants,
vs.
UNITED STATES FIDELITY AND GUARANTY COMPANY.

And now, April 16th, 1908, comes V. B. Archer, Attorney for Farmers & Mechanics National Bank of Parkersburg, West Virginia, and the Second National Bank of Parkersburg, West Virginia, appellants in the above entitled cause, and shows to the Court that this is an appeal from an interlocutory order and decree of the
246 Circuit Court of the United States for the Northern District of West Virginia, in Equity, granting an injunction against these appellants, as will appear by the record, and moves the Court to place and advance this cause at the head of the next argument calendar, so that the same shall have and take precedence in this Court, in accordance with the Act of Congress approved the third day of March, 1891, as amended by the Act approved the sixth day of June, 1900, and the Act approved the fourteenth day of April, 1906.

V. B. ARCHER,
Attorney for the Farmers & Mechanics National Bank of Parkersburg, West Virginia, and the Second National Bank of Parkersburg, West Virginia.

Endorsed.

"Executed April 16, 1908, by delivering a copy hereof to B. M. Ambler, Esq., Attorney for the within named appellee, United States Fidelity and Guaranty Company.

J. A. GRIFFIN.

Subscribed & Sworn to before me this 16th day of April, 1908.
V. B. ARCHER,
Notary Public, Wood County, West Virginia."

"Legal service accepted for United States Fidelity and Guaranty Company, Appellee."

Afterwards, to-wit; on April 22, 1908, twenty copies of the printed record are filed.

47 *Order Fixing Argument for May 8, 1908.*

Filed May 5, 1908.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. BRAY, Trustee of Evansville Contract Company, Bankrupt; M. J. BRAY, LAURA EICHEL, JACOB EICHEL, et al., Appellants,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY et al., Appellees.

Upon the motion of the appellants to advance this case for argument under the Act of Congress of April 14, 1906, giving precedence to such cases,

It is hereby ordered, that this case be advanced and set for argument on Friday, May 8, 1908.

May 5, 1908.

J. C. PRITCHARD,
Circuit Judge, Presiding.

At the May Term, 1908, of our said Circuit Court of Appeals, to-wit; on the 8th day of May, 1908, the said cause came on to be heard and was argued by counsel before Pritchard, Circuit Judge, and Waddill and Boyd, District Judges, and submitted.

Afterwards, at the May Term 1909, to-wit; on the 3rd day of June, 1909, the Court here announced and filed its opinion, which is as follows, to-wit:

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Opinion.

Filed June 3, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. BRAY, M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt; JACOB EICHEL, LAURA EICHEL, et al., Appellants,

versus

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Riter-Conley Company and Nicollette Lumber Company, Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

[Argued May 8, 1908. Decided June 3, 1909.]

Before Pritchard, Circuit Judge, and Waddill and Boyd, District Judges.

William M. Hall and J. A. Dupuy (V. B. Archer on the briefs) for the appellants, and B. M. Ambler (Van Winkle & Ambler on the briefs) for the appellees.

Statement of Case.

The Evansville Contract Company, a corporation under the laws of the State of Indiana entered into four several contracts with the United States for improvements to be made by the Contract Company in the Ohio, Big Sandy and Congaree rivers. One of these contracts was for the construction of a dam in Big Sandy river, Kentucky, another for the construction of a dam in the Congaree river, South Carolina, another for the construction of Dam No. 3 in the Ohio river at Coraopolis, Ohio, and still another for the construction of Dam No. 18 in the Ohio river near Parkersburg, W. Va. It was a requirement of each of the contracts with the Government that the Contract Company should give a bond for the performance of the contract, and in compliance with this requirement the said company, with the United States Fidelity & Guaranty Company as surety, gave four bonds, one dated November 13th, 1900, in the penalty of thirty thousand dollars for the construction of the dam in the Big Sandy river, another dated October 2nd, 1902, in the penalty of thirty thousand dollars for the construction of the dam in the Congaree river, another dated September 19th, 1903, in the penalty of fifty thousand dollars for the construction of Dam No. 3 in the Ohio river, and still another dated November 21st, 1904, in the penalty of ninety thousand dollars for the construction of Dam No. 18 in the Ohio river.

The United States Fidelity & Guaranty Company is a Maryland corporation with its principal office in the City of Baltimore where it is engaged in a fidelity, insurance and surety business. In order to procure the United States Fidelity & Guaranty Company to become surety on the several bonds above mentioned, the Contract Company executed an agreement of indemnity in which it bound itself to indemnify the Fidelity & Guaranty Company against all loss, costs, damages, charges and expenses whatever resulting from any of its acts, default or negligence, that the United States Fidelity & Guaranty Company might sustain or incur by reason of having executed said bonds or any continuation thereof. It was further a part of the indemnity agreement that in the event the Contract Company was unable to complete or carry on the contracts that the said company would assign to the Fidelity & Guaranty Company, and did assign, such plant as the Contract Company might own or have upon the work, and in addition thereto such vouchers or other evidence of payment of all costs and expenses whatever incurred by the Fidelity & Guaranty Company in adjusting loss or in completing the contract. It was also a part of the agreement of indemnity that in case of breach or default on the part of the Contract Company in any provisions of the contract, that the Fidelity & Guaranty Company should be subrogated to all the rights and properties as principal in the contract and that deferred payments and any and all moneys and property due and payable to the Contract Company at the time of the breach or default and that which thereafter became
249 due and payable on account of the contract should be credited upon any claim that might be made upon the Fidelity & Guaranty Company by reason of being surety upon the bond. The conditions of each of the four bonds on which the Fidelity & Guaranty Company was surety were the same and as follows:

"Now, therefore, if the above bounden, the Evansville Contract Co., shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said Evansville Contract Company, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same and shall promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue."

The provisions in the condition of the bonds in regard to the payment for labor and material is by virtue of the Act of August 13th, 1894, 28 Statutes at Large, Chapter 280, which reads as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all per-

sons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: Provided, That such action and its prosecution shall involve the United States in no expense."

It may be stated also that it was a stipulation in each of the contracts with the Government that the latter should retain a certain percentage of the contract price until the work was completed and in case of default by the contractor the Government had the right to take possession of the work and plant and prosecute the work to completion. After the Contract Company had entered into these several contracts with the United States and had given the bonds hereinbefore set forth and after the work had been proceeded with to some extent, the Contract Company became largely involved in debt and unable to meet its obligations and as a consequence upon the petition of creditors the said Contract Company, was, by the District Court of the United States for the Northern District of West Virginia, adjudged a bankrupt on the 27th day of February, 1904. At a meeting of the creditors M. J. Bray, C. D. Dotson and Alfred Heine were chosen as trustees of the bankrupt. The creditors of the bankrupt then set about to make an arrangement by which the trustees of the bankrupt estate might complete the work under the contracts made by the Contract Company with the United States, but the Fidelity & Guaranty Company objected to such arrangement, unless indemnity was provided by which it would be relieved from liability on the several bonds upon which it was surety. After some negotiations the following agreement was entered into between the United States Fidelity & Guaranty Company and the several banks named therein, to-wit:

"Memorandum of Agreement, made this eleventh day of April, 1904, between the United States Fidelity and Guaranty Company, a corporation under the laws of Maryland, of the first part, and the City National Bank of Evansville, Indiana, and the First National Bank of Evansville, Indiana, the Citizens National Bank of Evansville, Indiana, the Second National Bank of Parkersburg, West Virginia, and the Farmers and Mechanics National Bank of Parkersburg, West Virginia, The Farmers Bank of Rockport, Indiana, The First National Bank of Rockport, Indiana, all being corporations, of the second part.

"Witnesseth, That upon the execution and delivery unto the party of the first part by the parties of the second part of a bond of the parties of the second part to indemnify and save harmless the said United States Fidelity and Guaranty Company, from all loss, charge

damage and liability heretofore accrued or hereafter accruing against it by reason of its suretyship or liability on four several bonds executed by the Evansville Contract Company to the Government of the United States or to its proper officers on which the party of the first part herein is surety, which bond of indemnity shall be in the aggregate sum of seventy-five thousand ($75,000) dollars, and each of the parties of the second part herein is to be bound thereby to pay such proportion of said sum of seventy-five thousand ($75,000) dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness held by them respectively—then, upon the delivery of such bond duly executed the party of the first part herein covenants and agrees as follows:

"First. That the party of the first part will consent to the performance by the trustees appointed in bankruptcy in the District Court of the United States for the Northern District of West Virginia, for the estate and in the matter of the said Evansville Contract Company, bankrupt—of the contracts between the said Contract Company and the Government of the United States or its officers in the said bond to be mentioned and set forth.

"Second. The party of the first part will consent to the payment to the said trustees of all moneys accrued and accruing under said contracts in the same manner and to the same extent that the said Evansville Contract Company would be entitled to receive the same if it had continued its business and had continued to perform the said contracts.

"Third. The party of the first part will consent that under the orders of the said bankrupt court the said trustees may borrow money and issue trustees' certificates therefor, to such an amount as the court may authorize, and that moneys so borrowed and certificates so issued may be made a first lien upon the assets of the said bankrupt, and the party of the first part agrees generally that it will make and execute such consents, papers and writings as may be required of it as surety by the Government, to facilitate and to continue by the said trustees the performance of the business and contracts of said bankrupt and to enable the said trustees to prosecute and to finish such contracts and to enjoy all benefits that may flow therefrom and from the performance thereof.

"Fourth. The party of the first part reserves the right and makes this contract with the understanding that it does not waive its right to collect the premiums on its several bonds as surety for the Evansville Contract Company, and also reserves the right to take such measures as it may be advised for the collection of such premiums, if default is made in the payment thereof."

And thereupon the banks executed the following bond:

"Know all men by these presents: That we, The City National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, The Second National Bank of Parkersburg, W. Va., The Farmers & Mechanics National Bank of Parkersburg, W. Va., The Farmers Bank of Rockport, Indiana, The First National Bank of Rockport, Indiana, all being corporations, are held and bound

unto the United States Fidelity and Guaranty Company, a corporation existing under the laws of the State of Maryland, in the aggregate sum of seventy-five thousand ($75,000) dollars, and each of the said obligors binds itself severally and not for any other person, to pay such proportion of said sum of seventy-five thousand ($75,000.00) dollars as the amount of its claim or indebtedness against the Evansville Contract Company bears to the total aggregate of such claims or indebtedness, as shown below.

"Sealed with our seals and dated this fourth day of April, 1904.

"The condition of the obligation is such that whereas, the Evansville Contract Company, a corporation under the laws of Indiana, and a debtor to above obligors, has entered into four several contracts with the Government of the United States, through its appropriate officers, and the said Evansville Contract Company has given bonds for the performance of said contracts and for the payment of all persons supplying labor or materials in the prosecution of the work provided in said contracts, on each of which bonds, The United States Fidelity and Guaranty Company, is surety, which bonds are more particularly described as follows:

"1. Bond executed September 19, 1903, in the penalty of fifty thousand ($50,000.00) dollars, covering contract for building Dam No. 3 in the Ohio river at Coraopolis, Pennsylvania.

"2. Bond executed November 21, 1904, for ninety thousand ($90,000) dollars, covering building of Dam No. 18 in the Ohio river near Parkersburg, West Virginia.

251 "3. Bond executed October 2, 1902, for thirty thousand (30,000) dollars, covering building of dam in the Congaree river, at Columbia, South Carolina.

"4. Bond executed November 13, 1900, for thirty thousand ($30,000) dollars, covering building of Dam No. 2 in Big Sandy river, Kentucky.

"A copy of each of said bonds is herewith filed as part hereof.

"And whereas, After the work had been commenced under each of said several contracts, and partially completed, an order was made in the District Court of the United States for the Northern District of West Virginia, on the 27th day of February, 1904, adjudging the Evansville Contract Company to be a bankrupt, and

"Whereas, On the 15th day of March, 1904, M. J. Bray, Alfred Heine and C. D. Dotson, were appointed trustees of the said Evansville Contract Company, in bankruptcy, and

"Whereas, At a meeting of the creditors of said bankrupt, it was, on petition of said trustees, ordered, among other things, that the trustees should be authorized to conduct the business of the Evansville Contract Company and to finish the contract theretofore undertaken by the said bankrupt, and for that purpose to borrow money in amount not exceeding seventy-five thousand ($75,000.00) dollars, and to issue trustees' certificates therefor, and

"Whereas, The undersigned creditors of said bankrupt believe it to be to the interest of the creditors that such contracts be finished by said trustees, and that monies be borrowed by the trustees according to the order or decree of the bankrupt court, and the United

ates Fidelity and Guaranty Company is unwilling that that course ould be taken unless it be indemnified against any liability that s accrued, or may accrue, to it by reason of its being a surety on ch of the bonds above mentioned.

"Now, therefore, If the above obligors shall and will in all respects ndemnify and save harmless the said United States Fidelity and uaranty Company from all loss, charge, damage, and liability eretofore accrued, or hereafter accruing, against it by reason of s suretyship, or liability, on said bonds, and on each of them, then his obligation is to be void; otherwise to remain in full force and irtue."

The debt and claims referred to, in this bond, for the purpose of eckoning the proportion above mentioned, are as follows:

The City National Bank of Evansville, Ind.....	$5,000.00
The First National Bank of Evansville, Ind.....	24,000.00
The Citizens National Bank of Evansville, Ind.....	24,000.00
The Farmers & Mechanics National Bank of Parkersburg, W. Va.....	20,000.00
The Second National Bank of Parkersburg, W. Va.	25,000.00
The Farmers Bank of Rockport, Ind.....	10,000.00
The First National Bank of Rockport, Ind.....	7,000.00
	$115,000.00

In pursuance of the order made by the referee, the trustees took charge of the work under the contracts which the Contract Company had with the United States and prosecuted and completed the same, and received from the Government the contract price therefor. On or about the 19th of December, 1905, after the trustees had completed all of the contracts, had sold the bankrupt's property and collected all assets, they filed a report with the referee that the amounts received from the Government and from the sale of the plant and property of the bankrupt, after deducting disbursements, left the sum of $36,602.96, subject to allowance for cost of administration thereafter to be determined. It further appeared from the report that the operations of the trustees had not resulted in profit and that the funds in their hands would not pay the debts. The funds belonging to the estate as above stated was deposited in the Second National Bank of Parkersburg, W. Va., and in the Farmers & Mechanics National Bank of Parkersburg, W. Va., one-half thereof being deposited in each of the said banks where it still remains. In the course of the proceedings Heine, one of the trustees, died, Dotson, another trustee, resigned, and M. J. Bray was in March, 1906, appointed sole trustee of the bankrupt estate.

Jacob Eichel, a citizen and resident of Indiana, was president of the Evansville Contract Company, and after the arrangement was entered into and the order made by the referee for the trustees to continue work under the contracts, said Eichel was employed to superintend the work and acted in this capacity until the work was completed. A number of claims for material furnished to the con-

tractor and for labor performed in the construction of the work under the Government contracts, before the adjudication in bankruptcy were presented to the referee, and he on November 19th, 1904, entered a decree establishing the following as preferred claims in the distribution of bankrupt's estate:

252	D. A. Rardin, Athens, O.	$327.00
	Duncan & Porter Co., Allegheny, Pa.	160.00
	Riter-Conley Co., Pittsburg, Pa.	4,858.25
	The Parkersburg Mill Co., Parkersburg, W. Va.	5,005.59
	The Monongahela River Consolidated Coal & Coke Co., Pittsburg, Penna.	4,582.98
	Pittsburg Trolley Pole Co., Pittsburg, Pa.	634.20
	The Nicola Brothers Co.	1,199.77
	C. D. Dotson, Parkersburg, W. Va.	2,084.08
	C. C. Martin & Co., Parkersburg, W. Va.	372.15
	The Variety Iron Works, Cleveland, O.	7,348.00
	E. L. Oles	148.20
	Southeastern Lime and Cement Co.	2,806.00
	Clydesdale Stone Company, Pittsburg, Pa.	6,185.35
	Withers & Van Devender, Parkersburg, W. Va.	3,000.00
	E. K. Neale, Ben Lomond, W. Va.	1,045.50
	Lombard Iron Works, Augusta, Ga.	2,107.82
	The total amount of said claims, as will be seen being	$42,164.89

On the 12th of December, 1904, Phillip W. Frey served notice upon M. J. Bray, the trustee, that he was the owner by assignment of all of the above mentioned claims except one of $4,858.25 due to Riter-Conley Co., of Pittsburg, Pa., and directed the trustee to pay from the assets of the bankrupt in his hands certain notes given by the said Frey to the City National Bank of Evansville, Indiana, to which the aforesaid claims were attached as collateral, and also to pay to the said bank one-half of the remainder due upon the said claims after the discharge of the notes aforesaid. It appears further from the record that before the trustee had complied with this direction, that Laura Eichel, the wife of Jacob Eichel, became the owner of the claims held by Frey, the total of which being $35,663.82, and that she bought the same at a discount, paying $27,037.39 therefor. In order to raise the money to purchase these claims Laura Eichel borrowed from M. J. Bray $27,037.39 and gave a note to the said Bray for this amount on December 31st, 1906, payable on demand at the City National Bank of Evansville, Indiana, to bear interest at the rate of three per cent., payable semi-annually, the said note being signed by the said Laura Eichel and her husband, Jacob Eichel. In connection with this transaction, it was agreed that as the said Bray had furnished Laura Eichel the money to buy the claims and had loaned it to her at the low rate of three per cent. interest, that he, the said Bray, was to retain one-half of the excess paid upon the said claims over and above the amount of the note which had been given to him for the money as above

dated. It further appears in the record that on the 3rd of February, 1905, the United States Fidelity & Guaranty Company, the complainant in the present action, filed a petition in the bankruptcy matter of the Evansville Contract Company pending in the District Court of the United States for the Northern District of West Virginia and before George W. Johnson, Esquire, referee.

In this petition is recited in substance the execution of the several bonds as surety for the Evansville Contract Company for the performance of the contracts, together with the condition of the said bonds, also that petitioner believes that several persons have supplied labor and materials in the prosecution of the work provided for in each of the contracts and that the holders and owners of claims on that account have proved the same in the bankruptcy matter, but that petitioner does not know the facts in regard thereto nor the names of the holders of such claims nor the amounts to which they are actually entitled constituting a liability on petitioner's bonds as surety. The petitioner also recites the agreement of indemnity referred to before made by the Contract Company in connection with the execution of the said bonds. It is further set out in the petition that the petitioner acquired a lien by the terms of the indemnity upon the plant and property of the bankrupt about each of the several works included in the contracts, and also a lien upon all funds and moneys earned by or arising from the said contracts in the hands of the Government and due and owing under the said contracts; that each of these liens was in existence at the time of the adjudication in bankruptcy and still continues so far as may be necessary for the indemnity of the petitioner upon any and all liabilities whatever arising upon each and all of said bonds. The petition proceeds further to allege that after the bankruptcy, the agreement allowing the trustees to proceed with the work was made and that in order to indemnify the petitioner against loss by reason of its surety-ship, the bond was executed by the banks, as before stated, and further that the trustees proceeded with the work and completed it, and that they had in hand as a net result of proceeds of the work and sale of the property in December, 1905, about $36,000.00. The petition further refers to the decree establishing the preference of claims for labor and material as hereinbefore set out and says that petitioner does neither affirm or deny the correctness of any one of said claims and reserves the right to attack or defend against each and all of them if so advised in case any demand is made
253 upon petitioner on account thereof or in case any recourse is sought by any of them upon your petitioner's bonds. The petitioner then insists that the whole amount of money in the hands of the court will not be sufficient to satisfy the claims of the class referred to and that petitioner has a lien on all of said funds for its indemnity and is advised that equity will protect such lien. The petition further alleges that petitioner is advised that it is entitled to intervene and assert the lien on the fund in the hands of the court and require that the fund in the court's hand shall be applied to the satisfaction of the debts and claims against the bankrupt for which the petitioner is liable, and that petitioner is also entitled to obtain the protection of the court for its right and also for the pro-

tection of the several banks which signed the bond of indemnity. The prayer of the petition was that petitioner be permitted to file it and that the trustees together with the several banks named be made parties defendant and that the rights and lien of the petitioner be respected and enforced upon the funds in the hands of the trustees and under the control of the court; that the court ascertain what persons hold claims for materials furnished and labor performed in the prosecution of the several contracts and what persons are entitled to enforce any liability upon any of the bonds executed by petitioner; that the court ascertain the amount of such claims and cause the funds in the hands of the court to be applied upon such claims and in satisfaction thereof, etc.

About this time a man by the name of John G. Eigenmann filed notice with the trustees objecting to the order of the 19th of November, 1904, entered by the referee preferring the claims for labor and materials, and the trustees filed their petition with the referee asking that the said decree should be reopened and that the claims theretofore preferred should be re-examined and the facts in regard thereto inquired into. Thereupon the referee on the 12th day of February, 1906, entered an order that the said claims be re-examined and instructed the trustees to file the necessary pleadings to raise the question as to whether or not the claims heretofore allowed are properly preferred claims and for the re-examination and consideration of the said claims. It appears however that on September 11th, 1906, Eigenmann withdrew his opposition to the preference of these claims in the distribution of the bankrupt estate. About this time suits were brought upon a number of these claims in the Circuit Court of the United States for the Western District of Pennsylvania and suits were brought upon others in the Court of Common Pleas Allegheny County, Pennsylvania—These suits all of which were brought under the provisions of the second paragraph of the Act of August 13th, 1894, are styled as follows:

UNITED STATES OF AMERICA for Use of (Here Giving the Name of the Original Owner of the Claim), Then for the Use of Philip W. Frey and Now for the Use of Laura Eichel,

versus

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, a Corporation.

These suits were pending in the Circuit Court of the United States for the Western District of Pennsylvania and also in the State court aforesaid and some of them were at issue and ready for trial when on the 21st day of September, 1907, the United States Fidelity & Guaranty Company presented its petition to the District Court of the United States for the Northern District of West Virginia in the matter of the Evansville Contract Company, bankrupt, and moved the court to be allowed to file a bill (which accompanied the petition) in the Circuit Court of the United States for the Northern District of West Virginia against M. J. Bray and other persons named in the petition, whereupon, the said District Court on the said date made the following order:

"Upon consideration whereof it is ordered, adjudged and decreed that leave and permission be and are granted unto the United States Fidelity & Guaranty Company to file such bill in the Circuit Court of the United States for this district, and that the same shall not be deemed to be in contempt or derogation of the powers and jurisdiction of this court, but rather as ancillary thereto."

Thereupon on the 21st day of September, 1907, the United States Fidelity & Guaranty Company filed on the equity side of the docket in the Circuit Court of the United States for the Northern District of West Virginia a bill of complaint which is the basis of the present controversy.

The bill sets out substantially many of the facts contained in the foregoing statement, particularly that the Contract Company had entered into the four several contracts mentioned, the agreement of indemnity executed by said company to the complainant—the fact that complainant executed the several bonds described and
254 conditions thereof; that the Contract Company undertook the work and failed and was adjudged bankrupt; that the bond of indemnity was given by the banks to complainant to the end that the trustees might complete the work under the contracts; that the work was completed, and after receiving the price from the Government and making a sale of the bankrupt's property there was in the hands of the trustees about $36,000.00—Upon this amount complainant claimed a first lien to the extent that it might be liable for claims due for materials and labor furnished the Contract Company.

The bill further charges that complainant is informed that claims of this character were outstanding at the time of bankruptcy to the amount of about $40,000.00, but that all of said claims had been bought up by Phillip W. Frey, the general counsel of the trustees in bankruptcy, and in conjunction with M. J. Bray, trustee, and Jacob Eichel, and that the three persons named had colluded and conspired together in violation of their fiduciary and trust relations and had acquired these claims (the same being all the labor and material claims due from the Contract Company, except two, one due the Riter-Conley Company and the other due the Nicolette Lumber Company) at a large discount and that the said claims had by showing which these parties made before the referee upon the testimony of Jacob Eichel and Alfred Heine, been adjudged as preferred in the distribution of the bankrupt's estate.

The bill further charges that these three parties, namely, Frey, Bray and Eichel had by conspiracy and collusion been instrumental in fixing the claims which they had bought as entitled to the first payment out of the assets of the bankrupt, etc.

The bill further charges that Laura Eichel was only a figurehead in the purchase of the claims, and that Jacob Eichel, Bray and Frey were the parties really in interest. It is also stated in the bill that the Farmers and Mechanics National Bank and the Second National Bank of Parkersburg, W. Va., had sold their respective claims of twenty thousand dollars and twenty-five thousand dollars to Jacob Eichel at a large percentage of their face, etc.—That this sale affected the profits which were expected to accrue from the com-

pletion of the contracts by the trustees; also that Eichel had acquired in his own name, or that of his wife, the claims of all the other banks which executed the indemnity bond of April 4th, 1904; that the First National Bank of Evansville had gone into liquidation and that the security of the complainant on the indemnity bond is being endangered thereby, and that Eichel had agreed to indemnify the First National Bank and The Citizens National Bank representing forty-eight thousand dollars of the one hundred and fifteen thousand dollars shown as the indebtedness of the Contract Company to the banks which signed the indemnity bond; that Bray had contracted to indemnify the First National Bank of Evansville against liability on the said bond, and that all of the banks which signed the bond had in some way been indemnified against liability except the Second National Bank and the Farmers and Mechanics National Bank of Parkersburg, W. Va.

The bill further charges that Bray, Frey and Eichel purchased the material claims because of an understanding and combination as aforesaid and at the time when they intended that the same would be paid first and in preference to all others. Also charges the pendency of the suits in the Courts in Pennsylvania.

The complainant then insist that each of the banks named had the benefit of their contract and each of them is bound and estopped to deny its proportion of liability according to the terms of the bond; that the net funds in the hands of the trustees after the payment of premiums due complainant and such unadjusted costs should first be applied to the satisfaction of whatever claims have the right of recourse against complainant as surety on the bonds of the Contract Company; that no claims held by M. J. Bray or Jacob Eichel or Laura Eichel or by any agents, servants or attorney of theirs shall be paid in an amount in excess of the sum actually expended therefor.

In addition to these the prayer of the bill is that an accounting be had to the end that the court may ascertain what claims are proper charges for material furnished under the contracts—That each of the banks which signed the bonds is interested in the application of the funds in the hands of the trustee for the satisfaction of the claims for which complainant is liable, and for that reason the said banks should be made parties defendant; that without the interference of the Circuit Court litigation and controversy with regard to the subject matter of the bill would result in a multiplicity of suits and a grievous wrong and hardship to complainant; that the District Court in bankruptcy has not settled and adjusted any such matters and has no jurisdiction or means to apply the requisite remedies to administer complete justice in one comprehensive suit and that complainant is remediless without intervention of the Circuit Court and therefore the further prayer is that the court take full jurisdiction of all the persons and parties and administer complete justice be-
255 tween them; that the writ of injunction be issued directed against Jacob Eichel, M. J. Bray, Laura Eichel to enjoin them from instituting, prosecuting or maintaining any action or suits before mentioned pending in the State or District of Pennsyl-

vania, and from instituting any action or actions against complainant on account of any claim or claims arising out of its suretyship on any of the bonds given as surety for the Contract Company, and further that the complainant be relieved from all liability on the said bonds by the application of the funds in the hands of the trustee and by the parties to the contract of indemnity of April 4th, 1904, and that complainant is entitled to all the rights and remedies that the parties hereto or any of them have against each other for indemnity or contributions.

The complainant made defendants in its bill M. J. Bray, trustee, Jacob Eichel and Laura Eichel all of whom are citizens and residents of the State of Indiana, the City National Bank of Evansville, Indiana, the Citizens National Bank of Evansville, Indiana, the First National Bank of Evansville, Indiana, the First National Bank of Rockport, Indiana, all National Banking Associations located in the respective towns named and being citizens and residents of the State of Indiana; the Second National Bank of Parkersburg, W. Va., the Farmers and Mechanics National Bank of Parkersburg, W. Va., banking associations under the laws of the United States located in the City of Parkersburg, W. Va., and citizens and residents of the State of West Virginia in the Northern District thereof; the Farmers Bank of Rockport, Ind., a corporation under the laws of the State of Indiana, and as such a citizen and resident of the State of Indiana, the Riter-Conley Company, a Pennsylvania corporation doing business in the City of Pittsburg, a citizen and resident of the State of Pennsylvania, and the Nicolette Lumber Company, a corporation under the laws of the State of West Virginia and a citizen and resident of the said State.

Upon the filing of complainant's bill a writ of subpœna was granted and a temporary restraining order was issued enjoining M. J. Bray, Jacob Eichel and Laura Eichel from prosecuting any suit or action against the United States Fidelity & Guaranty Company upon any claims mentioned in the bill upon which suits had been brought in the Court of Common Pleas, Allegheny County, Pennsylvania, or in the Circuit Court of the United States for the Western District of Pennsylvania, and from instituting any suit or action upon any such claims. The 19th of November, 1907, was designated by the court as the date for hearing the motion for permanent injunction. On the return day the defendants demurred to the bill. The demurrers were overruled and the injunction against Bray, Jacob Eichel and Laura Eichel was made permanent. Thereupon the defendants with the exception of the Riter-Conley Company and the Nicolette Lumber Company above named appealed to this court.

BOYD, *District Judge:*

The facts in this case are given at length and in detail to the end that the entire controversy between the parties may be clearly presented and thus enable us to more readily determine such question of law as may be necessary to dispose of the appeal. Although there are many propositions discussed by counsel, we think, the only question to be decided in order to dispose of the case here, is that of jurisdic-

tion, and it is our opinion that the Circuit Court did not have jurisdiction to entertain complainant's bill.

If otherwise complainant had the right to assert a lien upon the property of the bankrupt Contract Company, such right could not be availed of by a suit in the Circuit Court, the object of which was to reach and determine priorities in the distribution of assets in the custody of the bankrupt court. Practically the effect of complainant's suit in the Circuit Court is to stay proceedings in the matter of the Evansville Contract Company, bankrupt, in the District Court, and to undertake to determine priorities or preferences in an estate in the custody and control of the latter court—This the Circuit Court is not empowered to do, for the jurisdiction of the District Courts in bankruptcy in this respect is original and exclusive.

Complainant's counsel insist that as the fund sought to be subjected to the complainant's lien is within the territorial limits of the district that jurisdiction of the Circuit Court therefore attaches; but this fund which constitutes the res in this case is the estate of the bankrupt in the hands of the trustees, and in our opinion property or funds in custodia legis under the orders and decrees of a court of competent jurisdiction cannot be made the basis of jurisdiction in another court in an effort to establish liens upon such fund or property or otherwise deal with it. The District Court sitting in bankruptcy having this entire fund in custody and having complete jurisdiction to administer it, the Circuit Court has no power by its decree or order to interfere with it, nor is this want of power supplied by the order of the District Court permitting complainant's bill to be
256 filed, for if the Circuit Court was without jurisdiction, the District Court is not authorized to confer it.

The bankruptcy act provides that "The District Courts of the United States * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation, in chambers and during their respective terms, as they are now or may be hereafter held." And among the powers specifically mentioned to "allow claims, disallow claims, reconsider allowed or disallowed, and to allow or disallow them against bankrupt estates." And in the section conferring specific power on the bankruptcy court it is enacted "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." Mr. Loveland in his work upon bankruptcy, Second Edition, page 70, commenting on this last clause, says: "It was evidently the intention of Congress to establish a complete system of bankruptcy proceedings, and to confer on the courts of bankruptcy, constituted by the act, special jurisdiction over the whole subject and extending to all matters, acts and things to be done under and in virtue of bankruptcy."

In view of the provisions of the bankrupt act and the decisions which are many relating to its construction the conclusion is irresistible that it is the province of the bankrupt court to administer the

funds held by it in a proceeding in bankruptcy, and as was said by this court in New River Coal Land Company vs. Ruffner Bros., 165 Fed., 881,—"The powers of the District Court in bankruptcy are ample to administer an estate with due regard to priorities or vested liens, and to protect all interests in such estate, whether they be legal or equitable." What was said by this court in that case is substantially a reiteration of the law as laid down by the Supreme Court of the United States in Whitney vs. Wenman, 198 U. S., 539-552.

It is not necessary to consider any other of the various questions presented by the assignments of error and argued by counsel—Our opinion being that the Circuit Court was without jurisdiction, the demurrers to the bill should have been sustained—The refusal to do this was error and it was also error to grant the injunction. The decree of the Circuit Court is therefore reversed and the case will be remanded to the end that the injunction granted may be dissolved and complainant's bill dismissed.

Reversed.

257 Afterwards, at the same term, to-wit: on June 5, 1909, the Court here made and entered the following decree, to-wit:

Decree.

Filed & Entered June 5, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. BRAY, M. J. BRAY, Trustee of the Evansville Contract Co., Bankrupt; JACOB EICHEL, LAURA EICHEL et al., Appellants,

vs.

THE UNITED STATES FIDELITY AND GUARANTY CO., RITER-CONLEY CO., and NICOLETTE LUMBER CO., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed, with costs,
258 and the cause is remanded to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg, with directions to dissolve the injunction granted therein and dismiss complainant's bill without prejudice in accordance with the opinion of this Court.

J. C. PRITCHARD.

June 5, 1909.

259 *Petition for an appeal.*

Filed June 27, 1909.

In the United States Circuit Court of Appeals for the Fourth Circuit.

No. 812.

M. J. BRAY, M. J. BRAY, Trustee of the Evansville Contract Co., Bankrupt; LAURA EICHEL et al., Appellants,

vs.

THE UNITED STATES FIDELITY & GUARANTY CO., Appellee.

Upon Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Petition for Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

The Petition of the United States Fidelity & Guaranty Company of Baltimore, Maryland respectfully shows:

1. That in the above entitled cause there was rendered and filed a final decree in the United States Circuit Court of Appeals for the Fourth Circuit, in the above entitled and numbered cause, on the 5th day of June, 1909, reversing the decree of the United States Circuit Court for the Northern District of West Virginia, and dismissing the Bill filed by your Petitioner; and by the decree and judgment aforesaid of the Honorable Circuit Court of Appeals in reversing the decree of the Circuit Court; and in dismissing your Petitioner's Bill, manifest error has intervened, and your Petitioner has been prejudiced and aggrieved.

2. That the matter in controversy in said suit exceeds the sum of Five thousand dollars, besides costs and exclusive of costs and interest; and that this is not a case in which the decision of the said Circuit Court of Appeals is made final and non-appealable, but is a case proper to be reviewed by the Supreme Court of the United States upon appeal.

3. That the said cause arose under and was based upon statutes of the United States, which statutes were pleaded upon the
260 face of the Bill, and entered as essential elements in the determination of the rights of the parties, viz:

(1) The act of August 13, 1894 (28 Statutes at Large, 278, Chapter 280), entitled "An Act for the Protection of Persons furnishing materials and labor for the construction of Public Works."

(2) Sec. 23*a* of the Act of Congress of 1898, relating to Bankruptcy, whereby the Circuit Court has jurisdiction of all controversies * * * between trustees as such and claimants concerning property acquired or claimed by the trustee, etc.

4. The Supreme Court has jurisdiction by appeal of the matters

decided by the said Circuit Court of Appeals; and the jurisdiction below did not depend upon diverse citizenship.

5. Your Petitioner herewith files an assignment of errors to the decree complained of, and tenders any bond that your Honors may require.

Wherefore, the Petitioner prays for the allowance of an appeal from and supersedeas to said decree or order of June 5, 1909; that the cause may be carried to the Supreme Court of the United States; that a transcript of the record and proceedings and papers upon which said decree, order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States, and that all proper process may be issued, and due proceedings had to perfect the appeal prayed for.

And as in duty bound, your Petitioner will ever pray.

THE UNITED STATES FIDELITY & GUARANTY CO.,
By B. M. AMBLER, *of Counsel.*

W. W. VAN WINKLE,
B. M. AMBLER,
M. G. AMBLER,
Attorneys, Parkersburg, W. Va.

261 *Assignment of Errors.*

Filed June 27, 1909.

In the United States Circuit Court of Appeals for the Fourth Circuit.

No. 812.

M. J. Bray, M. J. Bray, Trustee of Evansville Contract Co. et al.
vs.
The United States Fidelity & Guaranty Co.

Assignment of Errors

Accompanying the Petition of the United States Fidelity & Guaranty Co., Praying an Appeal in Above Cause.

The said Appellant, U. S. Fidelity & Guaranty Co. assigns the following grounds of error, to the judgment, decree and opinion, made, filed and entered in above cause on the 5th day of June, 1909:

It was error—

1. To hold that the Circuit Court had no jurisdiction of the subject matter, for the alleged reason that the fund claimed by the plaintiff and appellant, and in the possession of Bray, Trustee, in Bankruptcy,—was in the exclusive control of the District Court.

Sec. 23*a* of the Act of 1898 gives jurisdiction in exactly that case.

2. It was error, to hold and decide that the plaintiff and appel-

lant had no right by a plenary suit in the Circuit Court, to enforce a lien derived under a Statute of the United States, against the Trustee in Bankruptcy, who had acquired the fund, which plaintiff was claiming, and which was located within the District wherein the Bill was filed.

3. It was error, to hold that the United States Circuit Court had no jurisdiction to consider and adjudge any right or claim of lien against the fund of $27,000 located and situated in the Northern District of West Virginia & being in the hands of Bray, Trustee; especially where the Honorable District Court had expressly sanctioned and approved the bringing of the suit, upon application duly made.

4. It was error to reverse the Decree of the Circuit Court,
262 awarding an injunction against a multiplicity of suits brought, fraudulently, in the name of Mrs. Eichel for the benefit of Bray, Trustee, upon material claims, purchased by Bray, Trustee, at a discount, which he had been authorized to pay out of the funds in his hands,—the primary fund for satisfying them.

5. It was error to deny relief to a surety, who was being oppressed by the fraud of Bray, Trustee, and his associates,—it being their duty to protect the surety.

6. It was error to decide that the Circuit Court had no jurisdiction of the complainant's Bill.

7. It was error to hold and decide, that the fund to which claim was made, and upon which a lien was charged, held and located in the Northern District of West Virginia, in the possession of the Trustee of a Bankrupt Indiana corporation, was not within the jurisdiction of the Circuit Court, under Section 8 of the Act of March, 1875, 18 Statutes, 470, 472, relating to jurisdiction of the Circuit Court.

8. It was error to hold and decide, that the District Court has power to protect all interests in a Bankrupt Estate, and, therefore, no Bill can be entertained in the Circuit Court, either to procure the adjudication of a lien upon funds in the hands of the Trustee, or to administer relief outside of the estate, as by enforcing an indemnity contract after ascertaining the amount applicable to the liability and the excess proper to be decreed against indemnitors.

9. It was error to dismiss the Bill for want of judicial power, on demurrers which go to the merits, on general equity jurisdictions.

10. It was error to deny to the Circuit Court, Federal judicial power, of a Bill asserting rights founded upon Statutes of the United States, claiming a fund and a lien thereon, actually located in the District, in the hands of a Trustee of a Bankrupt, against which Bankrupt, the plaintiff could have filed such Bill, prior to the Bankruptcy, under Sec. 23*a* of the Act of 1898.

11. It was error to dissolve the injunction.

263 For these and other errors apparent on the record, the appellant undersigned prays that the final order, judgment and

decree of the said Circuit Court of Appeals may be reversed and that the decree of the Circuit Court for the Northern District of West Virginia may be affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By B. M. AMBLER, *Of Counsel.*

B. M. AMBLER,
Parkersburg, W. Va.

264 *Order Staying Mandate.*

Filed July 2, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. BRAY, Trustee of Evansville Contract Company, Bankrupt; M. J. BRAY, LAURA EICHEL, JACOB EICHEL et al., Appellants,
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY et al., Appellees.

Upon the application of the appellees setting forth their intention to take an appeal from the decree entered in this cause to the Supreme Court of the United States,

It is ordered that the mandate in this case be and the same is hereby stayed for 60 days from the 26th of June, 1909, so as to give the said appellees time to prepare the necessary appeal papers.

June 26, 1909.

J. C. PRITCHARD,
Circuit Judge, Presiding.

265 *Order Allowing Appeal.*

Filed July 14, 1909.

In the United States Circuit of Appeals for the Fourth Circuit.

M. J. BRAY; M. J. BRAY, Trustee of the Evansville Contract Co., Bankrupt, et al.
vs.
UNITED STATES FIDELITY & GUARANTY CO.

Upon an Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

On the 27th day of June, 1909, the United States Fidelity & Guaranty Company filed its Petition with the Clerk of this Court, accompanied by an assignment of errors, praying an appeal from a final decree, judgment and decision rendered in the above case on the 5th

day of June, 1909, in the United States Circuit Court of Appeals for the Fourth Circuit; and now in open Court and at the same term at which said decree and decision was rendered, after consideration of said Petition and Assignment of Errors;

It is ordered that an appeal is allowed as prayed; and a Bond with good and sufficient surety tendered by the Appellant United States Fidelity & Guaranty Co., with condition required by law, in the sum of Five Thousand Dollars, is hereby approved to operate as a supersedeas; and it is ordered that the clerk do certify and transmit to the Supreme Court of the United States, a record of the cause and of the proceedings, orders and decrees herein, together with a copy of the opinion of our Court, according to law.

This 14th day of July, 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

266 *Appeal Bond.*

Filed July 14, 1909.

In the United States Circuit Court of Appeals for the Fourth Circuit.

No. 812.

Know all men by these presents, That we, the United States Fidelity & Guaranty Company, a corporation, as principal, and United Surety Company, a corporation of the State of Maryland, as surety, acknowledge ourselves to be jointly and severally indebted and held and firmly bound unto M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Co., Bankrupt, Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana, The Citizens National Bank of Evansville, Indiana, The First National Bank of Evansville, Indiana, The First National Bank of Rockport, Indiana, The Second National Bank of Parkersburg, West Virginia, The Farmers & Mechanics Nat. Bank of Parkersburg, West Virginia, The Farmers Bank of Rockport, Indiana, The Riter-Conley Co., and The Nicolette Lumber Co., in the sum of Five thousand dollars, for the payment of which we jointly and severally bind ourselves and each of us and each of our heirs, executors, administrators and successors, firmly by these Presents.

Witness the signatures and seals of the parties hereto, the corporate seal being duly affixed by lawful authority amply given, this 1st day of July, 1909.

The condition of the above obligation is such, That,

Whereas, In the certain cause in equity upon appeal, in the said Circuit Court of Appeals, wherein M. J. Bray, M. J. Bray Trustee and others, were appellants, and the United States Fidelity & Guaranty Company was appellee, a final decree was made and rendered against the said United States Fidelity & Guaranty Co., on the 5th day of June, 1909;

And, whereas, the said United States Fidelity & Guaranty Co. has

taken an appeal to the Supreme Court of the United States from said final order and decree;

Now, therefore, if the above named United States Fidelity
267 & Guaranty Co. shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then this obligation to be void; otherwise, it shall remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY CO.,
By RICHD I. LANG, *Vice-Pres.* [SEAL.]
ALBERT H. NACK, *Ass't Sec'y.*
UNITED SURETY CO.,
[SEAL.] By E. J. CLARK, *Vice-Pres't.*
Attest:
ROBERT A. DOBBIN, JR., *Secretary.*

O. K.
B. B.

The foregoing bond is Approved This July 14th, 1909.
J. C. PRITCHARD,
U. S. Circuit Judge.

268 Whereas, the United Surety Company, a corporation duly incorporated under the Act of April 8, 1902, of the General Assembly of Maryland, has deposited with me its articles of incorporation and the statement required by Section 3 of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as sole surety on recognizances, stipulations, bonds, and undertakings permitted or required by the laws of the United States to be given with one surety or with two or more sureties, and has satisfied me that it has authority under its charter to do the business provided for in the Act last mentioned; that it has a paid up capital of not less than $250,000 in cash or its equivalent; and that it is able to keep and perform its contracts.

Now, therefore, the said United Surety Company is hereby granted authority to do business under said Act in the State of Maryland, and also beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said Act.

M. D. PURDY,
Acting Attorney-General.

Department of Justice, Washington, D. C., January 18, 1906.

[Seal of Department.]

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Dec.* 31, 1906.

The above is a true copy of an original authorization to do business, issued by the Attorney General under the Act of Congress approved August 13, 1894.

Witness my hand and the seal of the Department.

[SEAL.]

O. J. FIELD,
Chief Clerk.

269 *Statement of the Condition of the United Surety Company as of December 31st, 1908.*

(As Filed with the Treasurey Dep't of United States of America.)

Assets.

Real Estate acquired by purchase	$250,000.00
Railroad and other Bonds	6,430.00
Other Stocks	207,000.00
Cash in Bank and Home Office	177,924.38
Premiums less than 90 days old, due from Agents less Commissions	64,287.57
Loans on Mortgages	6,000.00
Loans on Collateral	109,474.32
Accrued Interest	2,812.76
Windsor Trust Company	5,968.70
Advance on Contracts	22,003.48
Open Re-insurance Account	88,962.83
Total	$940,864.04

Liabilities.

Capital Stock paid in cash	$500,000.00
Premium reserve requirement	240,868.92
Reserve for Claims undergoing examination	11,017.44
Reserve for Claims, proofs not filed	12,372.24
Reserve for Claims in suit	16,059.50
Surplus	145,291.04
Due for Return Premiums and Re-Insurance	5,254.90
Estimated, Reserve for Taxes, etc.	10,000.00
	$940,864.04

STATE OF MARYLAND,
City of Baltimore, ss:

I, J. William Hill, Treasurer of the United Surety Company do hereby certify that the aforegoing is a true statement of the
270 assets and liabilities of said Company as of December 31, 1908, taken from the books and records of said Company.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Company, this Second day of January, A. D. 1909.

J. W. HILL, *Treasurer.* [SEAL.]

STATE OF MARYLAND,
City of Baltimore, ss:

On this 26th day of March, A. D. 1909, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came J. William Hill, Treasurer of United Surety Company, to me personally known and being by me duly sworn, deposeth and saith, that he is the said officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said Company; and that the aforegoing is a true statement of the assets and liabilities of said Company at the close of business, December 31, 1908, taken from the books and records of said Company; and that said Company has not since said 31st day of December, 1908, sustained any losses affecting its financial condition.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at the City of Baltimore, this 26th day of March, 1909.

[NOTARIAL SEAL.] HARRY E. MILES,
Notary Public.

271 *Copy of Resolutions Empowering Officers of the United Surety Company to Execute Bonds and Other Undertakings.*

This is to certify, That at a regular and lawful meeting of the Board of Directors of the United Surety Company, held in Baltimore City, Maryland, on the 11th day of January, 1906, at which a quorum was present, the following resolution was offered by Mr. S. S. Janey:

"Resolved, That the President or either of the Vice-Presidents be, and they hereby are, and each of them is, authorized and empowered to execute for and on behalf of the Company any and all bonds and undertakings, the same to be attested, and the seal of the Company affixed thereto, by the Secretary or Assistant Secretary of the Company."

Mr. E. J. Clark seconded the resolution, and it was unanimously adopted.

I hereby certify, That the aforegoing is a true and correct copy taken from the Minutes of Proceedings of the Board of Directors of the United Surety Company, as of the 11th day of January, 1906.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Company, this first day of July, 1909.

[Seal of United Surety Company.]

ROBERT A. DOBBIN, Jr., *Secretary.*

272 At a regular and lawful meeting of the Board of Directors of the United Surety Company, held in Baltimore City, State of Maryland, at which a quorum was present, the proceedings included the following:

"Mr. Ernest J. Clark nominated Mr. Henry G. Pennıman for Presi-

dent. The nomination was seconded by Mr. Edwin J. Farber and Mr. Penniman was unanimously elected.

"Mr. Edwin J. Farber nominated Mr. Ernest J. Clark, Mr. Edward R. Hoffman and Mr. George H. Cunningham for Vice-Presidents. Mr. George Dobbin Penniman seconded the nomination and Mr. Clark, Mr. Hoffman and Mr. Cunningham were unanimously elected.

"Mr. George Dobbin Penniman nominated Mr. Robert A. Dobbin, Jr., for Secretary. Mr. Samuel H. Tattersall seconded the nomination and Mr. Dobbin was unanimously elected.

"Mr. Edwin J. Farber nominated Mr. J. Wm. Hill for Treasurer. Mr. Henry C. Shirley seconded the nomination and Mr. Hill was unanimously elected.

"Mr. Edwin J. Farber nominated Mr. Chas. F. Bennett for Assistant Secretary and Assistant Treasurer. Mr. George Dobbin Penniman seconded the nomination and Mr. Bennett was unanimously elected.

"Mr. George Dobbin Penniman nominated Mr. Reverdy J. Kerr for Assistant Secretary. Mr. Samuel H. Tattersall seconded the nomination and Mr. Kerr was unanimously elected.

I hereby certify, That the aforegoing is a true and correct copy taken from the Minutes of the Proceedings of the Board of Directors of the United Surety Company, as of the 12th day of January, 1909.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Company, this first day of July, 1909.

273 ROBERT A. DOBBIN, JR., *Secretary.*

[Seal of the United Surety Company.]

STATE OF MARYLAND,
City of Baltimore:

On this first day of July, A. D. 1909, before me a Notary Public for the State of Maryland, in the City of Baltimore, personally appeared Robert A. Dobbin, Jr., of said City and State, with whom I am personally acquainted, who, being by me duly sworn, said that he is Secretary of the United Surety Company, that he is acquainted with E. J. Clark Vice-President of said Company, and that the signature of the said E. J. Clark subscribed to the attached instrument is in the genuine handwriting of the said E. J. Clark and was hereto subscribed in his presence.

He further said that he is the Custodian of the Corporate Seal of said Company, that the seal affixed to said instrument is such Corporate Seal, and that said instrument was signed, and said seal affixed thereto by him in his capacity as Secretary of said Company.

[NOTARIAL SEAL.] HARRY E. MILES,
Notary Public.

274 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Co., Bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; The Second National Bank of Parkersburg, The Farmers & Mechanics Bank of Parkersburg, West Virginia; The Farmers Bank of Rockport, Indiana; The Riter-Conley Co., and The Nicolette Lumber Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit—wherein the United States Fidelity & Guaranty Co., a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the United States Fidelity & Guaranty Co., appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. C. Pritchard, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 14th day of July, A. D. 1909.

J. C. PRITCHARD,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

[Endorsed:] 812. Service of within citation is accepted by the undersigned as counsel of record for the Nicollette Lumber Co., Laura Eichel, Jacob Eichel, M. J. Bray, M. J. Bray, trustee for Evansville Contract Co., Bankrupt; The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The Farmers Bank of Rockport, Indiana; The First National Bank of Rockport, Indiana. W. M. Hall, Attorney & Counsel of Record for Parties Named. July 15, 1909.

275 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Co., Bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; The Second National Bank of Parkersburg, The Farmers & Mechanics Bank of Parkersburg, West Virginia; The Farmers Bank of Rockport, Indiana; The Riter-Conley Co., and The Nicolette Lumber Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to an appeal allowed and filed in the

Clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit—wherein the United States Fidelity & Guaranty Co., a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the United States Fidelity & Guaranty Co., appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. C. Pritchard, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 14th day of July, A. D. 1909.

J. C. PRITCHARD,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

[Endorsed:] 812. Citation. Due and legal service of the within is hereby accepted July 16th, 1909. The Riter-Conley Co., by Reese Blizzard, Att'y. Farmers and Mechanics National Bank of Parkersburg, Second National Bank of Parkersburg, by their attorney, V. B. Archer. July 17, '09.

276 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Co., Bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; The Second National Bank of Parkersburg, The Farmers & Mechanics Bank of Parkersburg, West Virginia; The Farmers Bank of Rockport, Indiana; The Riter-Conley Co., and The Nicolette Lumber Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit—wherein the United States Fidelity & Guaranty Co., a corporation, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the United States Fidelity & Guaranty Co., appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. C. Pritchard, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 14th day of July, A. D. 1909.

J. C. PRITCHARD,
Judge of the United States Circuit Court of Appeals for the Fourth Circuit.

I admit legal service of this citation this 15 July, 1909.

M. J. BRAY,
Trustee of Evansville Contract Co., Bankrupt, in Bankruptcy.
By J. A. DUPUY,
Attorney.

[Endorsed:] 812. Citation. For J. A. Dupuy, Esq., Attorney.

277 *Order to Transmit Record.*

And thereupon it is ordered by the Court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste:

HENRY T. MELONEY, *Clerk.*

Clerk's Certificate.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 28th day of July, A. D. 1909.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

Endorsed on cover: File No. 21,791. U. S. Circuit Court Appeals, 4th Circuit. Term No. 111. The United States Fidelity & Guaranty Company, appellant, vs. M. J. Bray, M. J. Bray, trustee of The Evansville Contract Company, bankrupt, et al. Filed August 6, 1909. File No. 21,791.

Supreme Court of the United States

OCTOBER TERM, 1911

Office Supreme Court, U. S.
FILED.
DEC 9 1911
JAMES H. McKENNEY,
CLERK.

No. 111

THE UNITED STATES FIDELITY AND GUARANTY CO.,

APPELLANT.

vs.

M. J. BRAY, AND M. J. BRAY, TRUSTEE IN BANKRUPTCY, JACOB EICHEL AND OTHERS,

APPELLEES.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, REVERSING THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANT.

W. W. VAN WINKLE,
M. G. AMBLER,
B. M. AMBLER,
Counsel for Appellant,
Parkersburg, W. Va.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 111

THE UNITED STATES FIDELITY AND GUARANTY CO.,

APPELLANT.

vs.

M. J. BRAY, AND M. J. BRAY, TRUSTEE IN BANKRUPTCY, JACOB EICHEL AND OTHERS,

APPELLEES.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, REVERSING THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR APPELLANT.

W. W. VAN WINKLE,
M. G. AMBLER,
B. M. AMBLER,
Counsel for Appellant,
Parkersburg, W. Va.

MAIN QUESTIONS.

This appeal is from a final decree of the Circuit Court of Appeals, for the Fourth Circuit, reversing the Circuit Court for the Northern District of West Virginia; and dismissing, upon demurrers, a bill in Equity, and dissolving an injunction. The Bill was filed, to enforce a lien upon, and claim to, a fund of $26,000, within the said District, acquired by a Trustee in Bankruptcy.

There was diversity of citizenship, and the case involved Federal questions as to lien and liabilities, of a surety, on four bonds, aggregating $200,000.00, executed by a government contractor for river improvements, and conditioned as required by the Act of Congress of August, 1894, (28 Stats. 278) for the performance of the respective contracts, and to pay all persons supplying labor or materials in the prosecution of the work.

The local jurisdiction was based upon the unrepealed section 8 of the Act of March, 1875, (18 Stats. 472) relating to the enforcement of liens and claims upon property in any given district, by a suit in a Circuit Court, as construed by Dick v. Foraker, 155 U. S. 404; Citizens Savings Co. v. Ill. R. R. Co., 205 U. S. 521; Foster's Practice (4th Ed.), sec. 97, pp. 448, 454.

The Court of Appeals dismissed the Bill, on the ground that the Circuit Court had no jurisdiction, for the reason that *the fund being in the hands of a Trustee in Bankruptcy*, was in the *exclusive jurisdiction of the District Court, and, therefore, not "within the District where located, in the meaning of the Act.*

(Opinion and Decree, Record, pp. 218, 219.)

After entering upon the performance of these several contracts, the contractor was adjudged bankrupt; the Trustee completed the contracts and had on deposit twenty-six thousand dollars located in two National banks *in said District*, on which fund the surety had a valid claim and lien.

Meantime, the Trustee, as a private speculation, had fraudulently acquired at a discount, over thirty-five thousand dollars of claims of the class for which these bonds were liable; and the Trustee had brought some thirty actions at law, against the surety, on the bonds for his personal concealed use, while he was holding this money, which was the primary fund for the payment of such obligations. The surety was ignorant of the facts and imposed upon. The Trustee, in collusion with the former president of the bankrupt contracting company, was seeking to make the surety liable for excessive and fraudulent amounts, and to divert the fund into the hands of confederates, who held general debts against the bankrupt's estate.

The complainant is a citizen of Maryland, and every defendant is a proper party, adverse in controversy, and diverse in citizenship, from the complainant. The bill sought to enforce a lien and a claim upon the twenty-six thousand dollars located in the District. It alleged an unconscionable advantage by the Trustee and confederates; the multiplicity of suits; the need for an accounting to ascertain the claims and amounts thereof, and to construe the Act of Congress and settle the rights and liabilities of the surety, the right of the complainant to have each claim purged of excess and of profits to the

Trustee; and the bill also showed the necessity of an adjustment, and an assessment upon certain persons who had given bond to indemnify the surety.

The bill prayed (Record pp. 17-18)—

(1) A decree that the fund in the hands of the Trustee and now deposited in designated banks in said District, is subject to a lien for the payment of all debts and claims for material * * * "and shall be applied to whatever are just and proper debts owed for materials and labor supplied, *within the meaning of the said Act of Congress*, and within the terms of your orator's bonds."

(2) That no claim be paid in excess of the sum actually expended by the fiduciary therefor.

(3) That an accounting be had, ascertaining the several amounts due and fixing the liability on the bonds, apportioning the liability as to each party in interest, etc. The bill also prayed an injunction against the prosecution of thirty odd suits brought on these same claims, against the complainant by Bray and his confederates, in the State and Federal Courts at Pittsburg, Pennsylvania. (Record p. 18.)

The District Court in Bankruptcy sanctioned and authorized the filing of that bill. (p. 62.)

Due notice was given of an application for injunction; demurrers were interposed, going in part to the jurisdiction of the Circuit Court, on the ground that some of the defendants were not residents of that District, and that the complainant had no lien on the fund.

Some of the parties demurred on the merits by general appearance.

The Circuit Court, on full hearing, overruled the demurrers and granted an interlocutory injunction against the prosecution of those suits in Pennsylvania. (p. 191.)

The defendants appealed, within thirty days from the allowance of the injunction; and the Court of Appeals dissolved the injunction and dismissed the bill (Record p. 219) on the sole ground; that the District Court in Bankruptcy had exclusive jurisdiction of the fund, and that no lien could be declared in a plenary suit in the Circuit Court, upon property in the hands of a trustee, (pp. 218-19.)

From that decree this appeal has been taken to the Supreme Court, upon errors assigned. (pp. 221-3 of the Record.)

Motions have been made here to dismiss the appeal for want of jurisdiction in the Supreme Court.

The main questions are—

1. Has the Supreme Court jurisdiction of an appeal from a final decree of the Circuit Court of Appeals in a suit involving the enforcement of rights and liabilities, based on a bond given by the requirement of, and conditioned according to, the terms prescribed by the Act of Congress of August 13, 1894? (28 Stats. 278.)

(This question is settled in the affirmative by several direct decisions. Henningson v. United States Fidelity & Gty. Co., 208 U. S. 404; Hardaway v. National Surety Co., 211 U. S. 552.)

2. Had the Circuit Court of the United States for the Northern District of West Virginia jurisdiction of a

suit (local action) to enforce a lien and claim upon a fund of twenty-six thousand dollars, in the hands of a Trustee in Bankruptcy, and located and deposited in said District, notwithstanding the fact that some of the defendants were not residents of the District—the suit being brought under the unrepealed section 8 of the Act of Congress of March 3, 1875.

(Citizens Savings & Trust Co. v. Ill. R. R. Co., 205 U. S. 46; Dick v. Foraker, 155 U. S. 404; Greeley vs. Lowe, 155 U. S. 58, 72; Ingersoll v. Coram, 211 U. S. 335; Frank v. Volkommer, 205 U. S. 521, 526.)

3. Is the Circuit Court deprived of jurisdiction to enforce a lien between citizens of different states upon a fund or property in the hands of a Trustee in Bankruptcy, on the ground that the *Bankruptcy Court has exclusive jurisdiction?*

a. Sec. 23a of the Bankruptcy Law conferred that jurisdiction on the Circuit Court, and it already existed under the Act of 1875. Frank v. Volkommer, 205 U. S. 521, at page 526.

b. The District Court having welcomed the aid of the Circuit Court, no question of exclusiveness is presented.

c. A Circuit Court has jurisdiction to decree a lien upon a fund under the administration of any court, where the fund itself is within the territorial limits of the district. Ingersoll v. Coram, 211 U. S. 335.)

STATEMENT.

Every question is presented on the face of the bill, demurrers to which were overruled by the Circuit Court and were sustained by the Circuit Court of Appeals,— the decision of the Court of Appeals dismissing the Bill, being based solely on the ground that the District Court in Bankruptcy has exclusive jurisdiction of all matters touching the fund in the hands of the Trustee in Bankruptcy,— a property located in said district, and therefore, there was no property within the District on which the Circuit Court could decree a lien.

The complainant filed its bill on the 21st day of September, 1907, *after obtaining from the District Court, "leave and permission* to file such bill in the Circuit Court of the United States for this District"—and it was ordered "that the same shall not be deemed in contempt or derogation of the powers and jurisdiction of this (district) court, but rather as ancillary thereto." (Record, p. 62.)

The Circuit Court ordered the bill to be filed at Parkersburg, where the money was located, it appearing "that the District Court has given leave that said bill be filed;" and a temporary restraining order was issued, enjoining, until further order, said M. J. Bray, Trustee, Jacob Eichel and Laura Eichel, from prosecuting numerous suits that had been brought at law, in the State and Federal Courts in Pennsylvania. The 19th day of November, 1907, was named for hearing the motion for the injunction, and process was ordered, under the act of March, 1875, against all of the defendants not

within the district, to appear by the 1st of November, 1907; and, also, that such process be served on the two banks at Parkersburg, being "the persons in possession and charge" of the money * * * * * "*as prescribed in Sec. 8 of the act of Congress of March 3, 1875*, relating to Circuit Courts." (Record p. 63.)

On November 19, 1907, the motion came on to be heard for the injunction. All of the defendants, or substantially all, entered demurrers and motions to dismiss the bill; several depositions and affidavits were filed; and the cause was submitted to the Court. (Record, p. 85.)

On the 18th day of January, 1908, the court overruled all of the demurrers, and allowed the parties sixty days to file answers and to interpose such other defense as they might be advised, and granted an injunction *until the further order of the court*, against Jacob Eichel, M. J. Bray and Laura Eichel, from instituting or maintaining any other actions or suits against complainant on account of any claim or claims arising out of its suretyship mentioned in the cause; "*and this decree is without prejudice to any proceedings in bankruptcy, and shall not be construed as interfering with any proceedings in bankruptcy in the District Court;* and the proceedings in this cause shall not until further ordered, in any way interfere with the administration of the affairs and assets of the bankrupt by the said District Court." (Record pp. 190-191.)

The bill (record p. 2 to page 18) is supported by many exhibits. Its chief averments are as follows:

The complainant, a citizen of Maryland, brings the bill against M. J. Bray, Trustee of the Evansville Contract Co., Bankrupt, (and M. J. Bray in his own right, p. 191,) also, against Jacob Eichel, Laura Eichel, The City National Bank of Evansville, The First National Bank of Evansville, The Citizens National Bank of Evansville, The First National Bank of Rockport, *all citizens of Indiana;* The Second National Bank of Parkersburg, and The Farmers & Mechanics National Bank of Parkersburg, corporations located in said district, *and citizens of West Virginia;* The Riter-Conley Co., a citizen of Pennsylvania; and the Nicolette Lumber Co., a citizen of West Virginia.

THE BILL ALLEGES—

1. The Surety Company, prior to the year 1904, had become surety on four bonds executed by the Evansville Contract Company, a Corporation of Indiana, for the performance of certain government contracts, covering improvements in rivers. These bonds are stated and described—aggregating two hundred thousand dollars; each conditioned that the Contract Company should perform the several respective contracts and "pay all persons supplying labor and materials in the prosecution of the work." The Contract Company had agreed in writing, to indemnify and save harmless the surety, and "in the event of the Contract Company being unable to complete or to carry forward the aforementioned contract, it *does hereby assign such plant as it may have upon the work, to the surety.*" The contract with the Government provided, that a certain per cent. of the money

earned, *should be retained* until completion; and if the Contract Company should make default, the Government should have the right to take possession of the work and the plant and prosecute the work to completion, in each case. The applications made by the Contract Company to the surety, provided that the latter should be subrogated to every right of the principal, and take all moneys to be paid by the Government, including the retained percentages, in the event of any breach or default on the part of the Contract Company. A copy of the application is filed, Exhibit A. p. 19; and a copy of the largest bond is filed, Exhibit B, p. 20. All of the others are identical in terms, and "upon the faith and in consideration, of the agreements and indemnity therein set forth; and of your orator's rights as surety under the said bonds and contracts; your orator became surety and had no collateral or other security from said company."

2. This cause presents a *controversy arising under the laws of the United States* relating to Government contracts and sureties under the Act of Congress above mentioned. The complainant *has a lien upon the fund of* over twenty-seven thousand dollars in the hands and possession of M. J. Bray, Trustee, and acquired by said Bray as Trustee; and the Circuit Court has jurisdiction of the cause under Section 23 (a) of the Act of Congress relating to bankruptcy.

(Section 23a reads: "The United States Circuit Court shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such, and adverse

claimants, concerning property acquired or claimed by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants.") Of this fund, twenty-six thousand dollars was deposited, in equal amounts, in the Farmers & Mechanics National Bank of Parkersburg, and in The Second National Bank of Parkersburg, in said Northern District of West Virginia, and within the jurisdiction of the Circuit Court; *and this Honorable court has jurisdiction of this cause*, under section 8 of the Act of March 3, 1875, relating to suits for the enforcement of liens, etc.

On March 20, 1906, M. J. Bray was appointed Trustee of the Contract Company, which had been adjudged bankrupt on February 27, 1904 (p. 4.)

"By virtue of the contract of indemnity executed by the Contract Company, the complainant acquired a lien upon all of the property and plant of the Bankrupt, at and about each of the several improvements mentioned; and complainant acquired a lien upon all funds and moneys earned by, or received from, said contracts, in the hands of the Government * * * *and each of these liens existed when the Company was adjudicated bankrupt, and still continues*, so far as necessary for the indemnity of the surety, who has every right and remedy of the Government against the Contract Company, and is entitled to every provision of the contracts in favor of the Government; and the complainant has every right and remedy of the Contract Company against the Gov-

ernment, and every right and remedy of those who furnished labor and materials in the prosecution of the work." (Page 5.)

4. On February 27, 1904, the Contract Company was adjudicated bankrupt, and since that time the plant and property has been sold; the proceeds from plant about Dam No. 18 being about $61,000.00; and there is a balance from all sources of $36,000; in the hands of the Trustee as of December 19, 1905 (p. 5), shown by Exhibit C, page 22.

5. After deducting allowances, the net balance would be $27,600.00 of which $26,000 is located in the Northern District of West Virginia. "The complainant has a lien upon, and a claim against, that fund for whatever amounts may be recoverable by persons having right of recourse on your orator's bonds, *and your orator is entitled to have that fund applied in payment of the claims of whatever* persons have supplied labor and materials in the prosecution of the work covered by your orator's said bonds, etc.

6. The Contract Company made default, and complainant's lien thereby fully attached to the property and assets.

7. Three trustees, including Bray were elected at the time of bankruptcy. These Trustees filed a petition upon which, on April 11, 1904, the Trustees were authorized to conduct the business of the bankrupt, to borrow moneys upon certificates to the amount of $75,000; to *pay the premiums accruing to sureties on bonds given to the Government;* to perform and to complete the con-

tracts existing between the bankrupt and the United States, "and to collect the contract price, *and to fully and completely release and save* harmless any and all sureties who may have guaranteed the completion of the contracts." (pp. 25-26.)

The complainant was the Surety Co. referred to, who should be protected and saved harmless.

The Trustees had represented, and Jacob Eichel, former president of the Contract Company, had given assurances, that much profit would arise upon the completion of those contracts. The total liabilities of the Bankrupt exceeded $150,000.00; the complainant was informed that the material and labor claims would reach about $40,000; but the complainant knew nothing whatever about the facts, "*and to this day your orator does not know what claims are just, and are properly recoverable on that account.*"

When the complainant discovered that the Contract Co. was bankrupt, and, the creditors desired to have the contracts finished, in order to realize a profit, the complianant expressed a willingness to allow the creditors to complete the contracts, and to take the profits, "if, *and only if*, your orator could be fully indemnified and saved harmless against all liability whatsoever to the Government, and on any claims for material or labor or other claims upon its bonds."

An agreement was signed on April 11, 1904, that upon the delivery by seven banks of a bond in the sum of $75,000.00 to indemnify the complainant from all liability, it would agree (1) the Trustee in Bankruptcy might

perform the contracts; (2) that the moneys in the hands of the Government should be paid to the Trustees; (3) That the Trustees might borrow money and issue certificates as a first lien, and that the complainant would cooperate and execute all consents necesary to facilitate the the performance of the contracts; and (4) that the premiums on the bonds should be paid. (Record p. 7.)

The agreement is Exhibit E, p. 26.

These trustees were strangers to the complainant. They were selected by the creditors, and the complainant had no interest whatever except to protect itself, but willing the creditors might have the benefit of all profits. Accordingly, a bond was delivered to the surety, executed by five Indiana banks, and two West Virginia Banks in the *aggregate penalty* of $75,000.00, "and each of the said obligors binds itself, *severally, and not for any other person,* to pay such proportion of said sum of $75,000.00, *as the amount of its claim* or indebtedness against the Evansville Contract Co., bears to the total aggregate of such claims for indebtedness, as shown below." (The amounts owed to the seven banks was $115,000.00, in amounts varying from five thousand to twenty-five thousand dollars respectively; so that, if an ultimate liability of $75,000.00 should fall on the surety, these banks severally agreed to make good for such portion of $75,000, as the debt to each bank bore to the total $115,000.00 owed to all of them. That is to say, if the total liability on the surety's bond should turn out to be $75,000.00, then the City National Bank of Evansville, Indiana, whose debt was $5,000, would pay to the surety

that proportion of $75,000.00 that $5,000.00 bears to $115,000.00, or one-twenty-third thereof, or about three thousand dollars. No one bank could be liable for more than about 65% of the amount of the debt it was seeking to save.)

This indemnity bond executed by all of these banks, upon the full recorded authority of their several Boards of Directors, duly certified, as Exhibit F, commences at page 27. That bond recites each of the four bonds given by the surety; the bankruptcy of the Contract Co.; the appointment of a trustee; and,

"Whereas, at a meeting of the *creditors* of said bankrupt. It was *on petition of said Trustees* ordered, among other things, that the trustees should be authorized to conduct the business of the Evansville Contract Company, and to finish the contracts theretofore undertaken by the bankrupt; and for that purpose to borrow money in amount not exceeding $75,000.00, and to issue Trustees' certificates therefor; and,

"Whereas, the undersigned creditors of said bankrupt believe it to be to the interest of the creditors that said contracts be finished by said trustees, and the moneys be borrowed by the Trustees according to the order or decree of the Bankrupt Court; and the United States Fidelity & Guaranty Company is unwilling that that course should be taken, *unless it be indemnified against any liability that has accrued or may accrue to* it, by reason of its being a surety on each of the bonds above mentioned.

"Now, therefor, if the above-bound obligors shall

and will, in all respects indemnify and save harmless the United States Fidelity & Guaranty Company from all loss, damages and liability *heretofore accrued, or hereafter accruing against it*, by reason of its suretyship and liability on said bonds, and upon each of them, then this obligation to be void." (Record pp. 28-29.)

The complainant accepted that bond of indemnity, and complied with everything required to be done (p. 8).

8. Subsequently, the trustees issued certificates for large amounts, and, in course of time, they performed and completed the several contracts. Your orator "*did not then know, and cannot now state what are the names of the persons, nor the amount of the claims which have a right of action against the bonds given to the Government.*"

"Your orator felt entirely secure and relied absolutely upon the indemnity furnished by the banks, and upon the *honesty and integrity of the Trustees* to protect the interests of all concerned. * * * Your orator had no knowledge or notice of any fraud or bad faith, until long after the giving of the bonds and the making of arrangements for your orator's indemnity, and until after the work on the Government contracts was *completed.*" (page 9.)

9. By order of April 11, 1904 (pp.24-25), the Trustees were authorized to employ Jacob Eichel, the president of the Evansville Contract Co.; and theretofore, the general manager thereof, at a sum not to exceed five hundred dollars per month to assist trustees in looking after interests of creditors, * * * and before your ora-

tor agreed to consent that the trustees should complete said contracts, and prior to making any agreement whatsoever with the banks or others on that subject, the said Jacob Eichel assured your orator, that the completion of the Government contracts would realize far more than sufficient to pay off all of what were termed '*preferred debts*,' and also to realize a large sum to be distributed to general creditors, because Eichel himself was very largely interested in completing the works, and paying off the creditors; and if your orator would consent to any arrangement by which the Trustees could proceed and raise money on Receiver's certificates, then Eichel would proceed at once to get control of all claims (for labor and materials) and would guarantee that the complainant would have no trouble or question with regard to any such claims; *and that no demand would be made on that account*. The complainant trusted all these assurances of Eichel as one consideration in agreeing to make the arrangements above mentioned. (p. 9.)

10. The books and papers of the bankrupt were in charge of the trustees, who were believed to be honest and to be advised by competent and faithful counsel; but in November, 1904, the Trustees procured an adjudication "that the following claims are preferred in this bankruptcy, and are so established in this decree as claims of that character," (Exhibit G. at the concluding p. 39,) aggregating about $40,000.00, alleged to be due for material and labor.

Complainant did not discover until the 5th day of September, 1907, (sixteen days prior to the filing of the bill) that substantially all of those claims had been

bought up at a discount by the general counsel of the Trustees in Bankruptcy in conjunction with M. J. Bray, Trustee, and Jacob Eichel, in collusion and conspiracy, and in violation of fiduciary and trust relations, and that these parties had been instrumental, in fixing the same as *entitled to first payment out of the assets, and as belonging to the class covered by complainant's bond;* and complainant, then, also, first discovered that on December 12, 1904, said counsel wrote a notice to Bray, Trustee, *reciting that counsel* was the owner of the claims and that Bray was interested therein; that one-half of the profit thereon was $4,500.00, and that these claims were entitled, by reason of the order of November 19, 1904, to first payment out of the funds in the hands of the Trustees. This document is exhibited as Exhibit H. (page 39.)

The counsel pretended afterwards to have assigned these claims to Laura Eichel, the wife of Jacob, under date of November 30, 1906. Subsequently, in March, 1907, some fifteen suits were brought *on these claims*, in a State Court, and about the same number of suits were brought in the Federal Court, at Pittsburg, Pennsylvania, creating a vexatious and unconscionable multiplicity. The complainant did not then know that any such claims were fraudulent or unjust, or that any fiduciary was interested therein; but in September, 1907, complainant discovered that Bray and Mr. and Mrs. Eichel had made certain agreements with reference to claims; that Bray had furnished all the money for the purchase of them; that some had been bought at fifty cents on the dollar; that they appeared to have been

sued for the use of Laura Eichel, but that Bray himself had instituted them, and had her written order that all the money should be paid to him; and these things were done in fraud and in violation of the trusts and duties of all parties concerned; and that Laura Eichel's name was being used as a mask. (Record p. 11; Exhibits I, K and L and M, pp. 41, 42, 43.)

11. By December 19, 1905, all the government contracts had been completed, and all moneys had been realized, and yet left the sum of $36,602. 96; that the operations of the trustees had not been profitable; that the funds in the hands of the trustee would not pay the claims for which the surety is liable and which are entitled to first satisfaction, although up to that time Bray, had given assurances that all of the preferred material and labor claims would be paid in full; about that time, *the attitude of the trustees changed*, so that on the 12th day of February, 1906, the complainant filed a petition before the Referee asking the application of the funds in the hands of the Trustees to the satisfaction of these debts. (p. 12, Exhibit N, pp. 44-45.)

Shortly after that, one trustee died, one resigned, and Bray was made sole trustee. Up to the date of the filing of the bill in September, 1907, there was no suggestion by any Trustee, that any part or any amount of the material and labor claims were unjust, or that the same did not cover material or labor furnished in the prosecution of the contracts (p. 13) * * *; but Bray and Eichel found that it was to their pecuniary interest, to appropriate on the claims of *general creditors, held by them*, the funds in the hands of the trustee; and they

have sought to maintain the amount of the claims at *their full face value*, and to enforce them against the complainant, who had no intimation, until recently, that the same were unjust. (p. 14)

All of the actions brought in Pennsylvania were instituted in the name of Laura Eichel, wife of Jacob, not for the use of Laura, but for the use and benefit, and by the instigation, of the said Bray, in fraud of the rights of the complainant, and for the purpose of harassing and oppressing complainant, of multiplying suits and proceedings, and to avoid the application of the *primary fund*, which is in the hands of the said Bray "in the jurisdiction of this Honorable Court, *where all of the transactions occurred*, where Dam No. 18 *is located*, and over sixty thousand dollars was realized from the plant there situated, and the claims aforesaid are most largely *for materials furnished for that dam*. The said Bray and Eichel have gathered unto themselves control of most all of the claims against the bankrupt's estate—they control the trusteeship and the right and the authority to take proceedings in bankruptcy, to expose and redress frauds on the funds; they have corrupt interests to subserve, in fraud of the complainant; they have interfered with the indemnifying banks, stirring trouble and creating embarrassments for the complainant; and the court should enjoin all of those actions for the collection of any of the claims held by Bray or Eichel, and should adjust all of the claims and the equities of all parties interested. This is the only court that can afford *full, adequate and complete relief in the* premises, ascertaining what amount should be paid to

each, and by whom, and enabling your orator to ascertain its liabilities, to have the same satisfied out of the lien fund, and by the indemnitors under their contract."

14. The said Bray and Eichel have conspired to not only deprive complainant of its right to apply the lien funds to the payment of just claims for material and labor, but it is a part of their scheme to compel the complainant, to pay claims that are unjust, and to divert the lien funds to the payment of the many unsecured claims, in which the said Bray and Eichel are interested. (p. 15)

15. Jacob Eichel bought the claims of the two Parkersburg Banks, who sold out to him at a large percentage of their face ($20,000.00 and $25,000.00), at a time when such sales were made possible, by reason of the complainant's permitting the performance of the government contracts; and Eichel likewise acquired in his own name, or in his wife's name, the claims of all *the other indemnifying banks*, two of which were assigned to the same counsel that had been co-operating with Bray and Eichel, while employed on behalf of the creditors of the bankrupt. (p. 16.)

> See Exhibits R. S. and T, pages 55, 56 and 57 of bill.

On December 1, 1906, Bray and the Eichels among them had about all of the "prefered claims," and all of the general indebtedness, so that if they should transfer this $27,000.00 to the general creditors; and if they also make this complainant pay the face of the material claims, they would defraud the complainant of the benefit

of its lien, and subject it to the defense of thirty odd suits in a district, and in courts that had nothing to do with the subject.

16. Jacob himself was adjudged bankrupt in 1904, and was discharged on the....day of February, 1905. (Record pp. 58-59.)

17. One of the indemnitor banks has failed. Eichel has agreed to indemnify two of the banks representing $48,000 of the $115,000.00; Bray has contracted to indemnify another of the banks, and Bray and Eichel, between them, have indemnified all of the banks, except those two that are located at Parkersburg, who have been led to take the position, that they would escape liability under the doctrine of ultra vires, after having realized a large sale of their claims because of the accepted benefits to flow from the agreement of the complainant to allow the trustees to finish the contracts.

18. Each of those banks is bound by the contract of April 4, 1904. No bank became bound for any person except itself, nor in excess of the amount of its own direct debt, being 75-115 or 65 per cent of its debt. Each gave that indemnity as a means toward collecting or realizing its own debt; and by having the trustees continue the business as authorzed by the terms of the bankrupt act. Each bank had the full benefit of the contract. Each of them is bound by its deed and by estoppel, to bear its proportionate liability according to the terms. The complainant *could have saved itself all cost or liability*, if it had not accepted that indemnity. *All of the trustees' certificates have been paid in full.* It

was understood by all the creditors secured and unsecured; and by the court under its order of April 11, 1904 (Record, p. 35-39), that the fund in the hands of the trustee *should be first applied to the satisfaction of whatever just claims would have right to recourse against complainant.* Bray and Frey and Eichel actually purchased material and labor claims because of that understanding, at a time when they intended that the same would be first paid, and in preference to all others; and there is no other lien or claim against that fund, except for liabilities to the complainant. (p. 19.)

19. An accounting should be had to ascertain what claims are proper for material and labor, *according to the Act of Congress;* that all profits of Bray on the claims purchased by him, should be abated; each one of the indemnifying banks is interested in the application and the enforcement of the lien, upon the funds in the hands of the Trustee, thereby relieving themselves of liability on their indemnity bond. Without the intervention of the Circuit Court, litigation and controversy would result in a multiplicity of suits and in a grievous wrong and hardship to the complainant. The Honorable District Court in Bankruptcy has not settled and adjusted any such matters, *and has no jurisdiction or means,* to apply the requisite remedies by *administering complete justice in one comprehensive* suit; and, therefore, your orator is remediless without the intervention of this court. "Your orator has applied to the District Court for permission to file this bill, and such permission and leave has been given, as shown by its order in that behalf.'

Prayer: That the Court will decree that the fund deposited in the two banks at Parkersburg in said District, *is subject to a lien for the payment of all claims and debts for materials* * * * and that the net amount thereof * * * shall be applied to whatever are just and proper debts owed by the bankrupt for materials and labor supplied within the meaning of said Act of Congress and within the terms of said bonds.

That the court will decree: That no claim held by Bray or the Eichels or their attorney shall be paid an amount in excess of the sum actually expended therefor; that due proceedings may be had for ascertaining the several amounts due for *labor and material furnished on each of said bonds; that the liability of your orator on each bond be fixed;* that the court will apportion said liability as to each party in interest; that the court will decree that each one of the defendant banks herein is bound and liable according to the terms of the said agreement of April 4, 1904, (indemnity); and that the complainant is entitled to have the indemnity bond enforced; that the court will apportion and fix against the Second National Bank of Parkersburg, and Farmers & Mechanics National Bank of Parkersburg, now within the District of this court, and against each of the other banks, parties to said agreement, the amount for which each is severally liable, and decree the payment of the same; that the court will take full jurisdiction of all persons and parties and administer complete justice between them; that an injunction be granted * * *; that a decree be made that the complainant is entitled to all the rights and remedies that the parties hereto, or any of them, have

against each other for indemnity or contribution—and for general relief.

This complainant applied to the District Court of the United States in Bankruptcy for proper redress against the trustee, and his counsel, as officers of the Bankruptcy Court, who were charged with perpetrating frauds upon the fund, looking to the removal of the trustee, and requiring them to refund the money heretofore allowed as compensation for services performed (p. 62); but the Bankruptcy Court had no power, and no concern with suits brought *against the surety* in another jurisdiction, and no way of preventing any kind of fraud or oppression that might be perpetrated upon the surety, *because the surety was not in bankruptcy;* and the Bankruptcy Court had no power whatever to give the surety the affirmative relief to which it was entitled.

The Demurrers and Motions to Dismiss.

The demurrers on behalf of the Indiana defendants are as follows:

The Farmers Bank of Rockport (Record p. 70);
The First National Bank of Rockport (p. 71);
Jacob Eichel (p. 74);
Laura Eichel (p. 75);
Citizens National Bank of Evansville (p. 77);
City National Bank of Evansville (p. 78);
First National Bank of Evansville (79);

Each and every one of these Indiana parties filed a demurrer in the same language.

"1st. The court has no jurisdiction to entertain such bill against this defendant, because such defendant is a resident of the State of Indiana, and is not within the district of this court.

"2nd. The bill in this cause *does not disclose or set up any legal or equitable lien*, to any property, real or personal, within the district of this court.

"3rd. The matters in litigation as shown by the bill, *are involved in suits in other United States Courts and other State Courts*, brought before the filing of this bill.' '

M. J. Bray, Trustee, (p. 82) demurs (not that he is not liable to suit in the District, but):

"1st. The court has no jurisdiction to entertain such bill against this defendant, *because the bill in this case does not disclose or set up any legal or equitable lien* upon any property, real or personal, within the district of the court.

"2nd. The matters in litigation as shown by the bill, are involved in suits in other United States Courts and other state courts, brought before the filing of this bill; that is to say, in the District Court of the United States for the Northern District of West Virginia, and other courts."

Demurrers are filed by two other defendants —The Farmers & Mechanics National Bank of Parkersburg (p.. 83), and the Second National Bank of Parkersburg (p. 80), both of whom are citizens of, and residents in, the District, and therefore their demurrers, in identical terms go, not to the jurisdiction of the Court as a

Federal Court but to the jurisdiction in equity, and to the merits.

The Demurrers of the Parkersburg Banks, were:

1. The Bill makes no case.
2. There is no equity in the Bill.
3. The plaintiff is entitled to no relief.
4. There is no jurisdiction of the subject matter.
5. The Indemnity contract of the Banks is ultra vires.
6. The Bill is multifarious. (Rec. pp. 80-83.)

Motions to dismiss the bill were filed by Jacob and Laura Eichel and all of the Indiana banks, on the grounds stated in their demurrers. (Rec. p. 75.)

On the Hearing for Injunction. (p. 85.)

The complainant moved for the Injunction as prayed, and filed a copy of *depositions* of M. J. Bray and others. (p. 85.) The demurrers were set down for argument; and Laura Eichel, Jacob Eichel and the Indiana banks filed the *affidavits of* Laura Eichel, of Jacob Eichel and of P. W. Fry and M. J. Bray, in opposition to the motion for injunction, and all of the Indianians (except Bray) joined in a motion to dissolve the Injunction theretofore awarded.

(This motion appears, p. 137.)

The *depositions of* Bray and others, commencing at p. 86 of Record, support the material allegations of the bill, charging fraud.

But attention is called to the filing *by defendants*, of affidavits, and putting themselves to a defense upon the merits.

Affidavit of Jacob Eichel, p. 137.

Affidavit of Laura Eichel, p. 142.

Affidavit of P. W. Frey, p. 149

and an answer in Bankruptcy of Bray, p. 151.

ADMISSION AND PROPOSITION OF M. J. BRAY, TRUSTEE.

This paper appears at p. 176 of the record.

It virtually admits speculation in claims, and his interest in the "material" claims (preferred) on which the suits at law had been brought; and offers to turn over his profits for the benefit of the general creditors (mainly owned by Eichels, or by them and him.)

The filing of affidavits by all the Indiana defendants, except Bray, and the demurrer of Bray, not denying jurisdiction on account of his residence (p. 82) amounted to a general appearance.

THE WEST VIRGINIA BANKS.

They had filed a Petition in January 1906 in the Bankruptcy Court alleging that they had exeuted the bond of indemnity to the Gaaranty Co. and stating their true position that they were liable for their proportion for what were known as the "preferred claims", being such as had recourse on the bonds given to the government, on which the Guaranty Co. was surety. (Rec. p. 177-8.) They demurred on grounds submitting to the jurisdiction—(p. 80-83).

THE ORDER OF THE CIRCUIT COURT, (P. 191).

The Circuit Court (p. 190) overruled all demurrers and motions to dismiss; and granted a temporary injunction, upon a bond of $10,000, injoining Mr. and Mrs. Eichel and Bray, "until further order" from prosecuting any of the suits pending in the State of Pennsylvania specified in the Bill etc. (p. 191.)

From this order, the defendants appealed. (p. 192-195.)

They assigned as errors,

1. In overruling the motions of the Indianians and others to dismiss the bill;
2. In overruling the motion to vacate the restraining order;
3. In overruling the demurrers;
4. In granting the Injunction.

Decision of the Circuit Court of Appeals.

On June 5th, 1909, the Circuit Court of Appeals reversed the decree of the Circuit Court; (219) dissolved the Injunction sustained the Demurrers and dismissed the Bill, for want of jurisdiction.

The opinion (Record p. 218) holds that "the Circuit Court did not have jurisdiction to entertain complainants Bill..... The effect of the complainants suit in the Circuit Court is to stay proceedings in the District Court, and to undertake to determine priorities and preferences, in an estate in the custody and control of the latter court. This the Circuit Court is not empowered to do, for the jurisdiction of the *District Courts in Bank-*

rupcy in this *respect is original and exclusive*.....this fund which constitutes the res, is the estate of the Bankrupt in the hands of the Trustee, and property or funds in custodia legis, under the orders and decrees of a court of competent jurisdiction etc.....nor is the want of power (in the Circuit Court) supplied by the order of the District Court permitting complainants Bill to be filled for if the Circuit Court was without jurisdiction, the District Court is not authorized to confer it."

(Note; the orders of the Circuit Court and of the District Court, show that this view is a misapprehension of fact and of law. The order of the Circuit Court does not stay or interfere with the Bankruptcy Court—(p. 191.)

ASSIGNMENT OF ERRORS.

On June 27, 1909, and within 24 days from the date of the decision, the appellant filed a Petition for appeal with an assignment of errors. (220-1.)

The appeal was allowed on July 14, and bond given. (223.)

The assignments of error are as follows:

It was error—

1. To hold that the Circuit Court had no jurisdiction of the subject matter, for the alleged reason that the fund claimed by the plaintiff and appellant, and in the possession of Bray, Trustee, in Bankruptcy,—was in the exclusive control of the District Court.

Sec. 23a of the Act of 1898 gives jurisdiction in exactly that case.

2. It was error to hold and decide, that the plaintiff and appellant had no right, by a plenary suit in the

Circuit Court, to enforce a lien derived under a Statute of the United States, against the Trustee in Bankruptcy, who had acquired the fund, which plaintiff was claiming, and which was located within the District wherein the Bill was filed.

3. It was error to hold, that the United States Circuit Court had no jurisdiction to consider and adjudge any right or claim of lien against the fund of $27,000, located and situated in the Northern District of West Virginia, and being in the hands of Bray, Trustee; especially, where the Honorable District Court had expressly sanctioned and approved the bringing of the suit, upon application duly made.

4. It was error to reverse the Decree of the Circuit Court, awarding an injunction against a multiplicity of suits, brought, fraudulently, in the name of Mrs. Eichel for the benefit of Bray, Trustee, upon material claims purchased by Bray, Trustee (at a discount), which he had been authorized to pay out of the funds in his hands,—the primary fund for satisfying them.

5. It was error to deny relief to a surety, who was being oppressed by the fraud of Bray, Trustee, and his associates,—it being their duty to protect the surety.

6. It was error to decide that the Circuit Court had no jurisdiction of the complainant's Bill.

7. It was error to hold and decide, that the fund to which claim was made, and upon which a lien was charged, held and located in the Northern District of West Virginia, in the posession of the Trustee of a Bankrupt Indiana corporation, was not within the jurisdiction of the Circuit Court, under Section 8 of the Act of March, 1875, (18 Statutes, 470, 472,) relating to jurisdiction of the Circuit Court.

8. It was error to hold and decide, that the District Court has power to protect all interests in a Bankrupt Estate, and, *therefore*, no Bill can be entertained in the

Circuit Court, either to procure the adjudication of a lien upon funds in the hands of the Trustee, or to administer relief outside of the estate, as by enforcing an indemnity contract after ascertaining the amount applicable to the liability, and the excess proper to be decreed against indemnitors.

9. It was error to dismiss the Bill for want of judical *power*, on demurrers which go to the *merits*, on general equity jurisdiction.

10. It was error to deny the Circuit Court, Federal judical power, of a Bill asserting rights founded upon Statutes of the United States, claiming a fund and a lien thereon, actually located in the District, in the hands of a Trustee of a Bankrupt, against which Bankrupt, the plaintiff could have filed such Bill, prior to the Bankruptcy, under Sec. 23a of the Act of 1898.

11. It was error to dissolve the injunction.

For these and other errors apparent on the record, the appellant undersigned prays that the final order, judgment and decree of the said Circuit Court of Appeals may be reversed and that the decree of the Circuit Court for the Northern District of West Virginia may be affirmed.

UNITED STATES FIDELITY & GUARANTY CO.

By B. M. Ambler of Counsel.

ARGUMENT.

Upon the Motion to Dismiss the Appeal.

This motion is based upon two grounds, (as shown by the motion papers filed):

(1.) That more than 30 days elapsed between the entry of the decree and the taking of the appeal; while the Act of 1891, section 7, requires that an appeal from an injunction order of a Circuit Court, to the *Court of Appeals*, must be taken in 30 days, *by the party enjoined*.

(2.) The Supreme Court has no jurisdiction, and the appeal does not lie, for the reason that no cause of jurisdiction in the Circuit Court existed, except diversity of citizenship.

Neither ground has foundation or color.

This motion was considered in October, 1909, when upon full briefs, the Supreme Court continued the motion to the hearing of the appeal.

But taking the points in order:

1. The limitation of 30 days, imposed upon a party under injunction, for taking an appeal from an interlocutory order, to the Circuit Court of Appeals, cannot apply to a party who takes an appeal from a *final decree*, and from the Circuit Court of Appeals, to the Supreme Court.

The limitation for an appeal to the Supreme Court from the Circuit Court of Appeals, is by Sec. 6 of the Act of 1891 "*one year*, after the entry of the order, judgment or decree sought to be reviewed."

The decree of the Court of Appeals was rendered June 5, 1909. The appeal was perfected on July 14, 1909. (Record, 219, 223.)

This Bill was an original proceeding, filed in the Circuit Court, and the Court of Appeals made a final decree dismissing it. The right of appeal is dependent upon the 6th section of Act of 1891, where the limitation is one year.

Allen vs. So. Pac. R. R., 173 U. S. 479.

Holt vs. Indiana Co., 176 U. S. 70.

2. By section 6 of the Act of 1891, all cases involving the construction or application of a Federal Statute, may be taken to the Supreme Court, where the matter in controversy exceeds $1,000, except in cases arising under laws relating to Patents, Revenue, Crime and Admiralty.

Loveland on Appellate Jurisdiction, pp. 377, 631-2.

The right of appeal to the Supreme Court is settled by Henningson vs. U. S. Fidelity & Guaranty Co., 208 U. S. 404, on the precise point.

"Although diversity of citizenship is alleged in the bill, if the grounds of the suit and relief are also based on statutes of the United States, which as in this case, are necessary elements of the decision of the Circuit Court of Appeals, an appeal lies from the judgment of that court to this Court.

"The equity of the surety on a bond given by a contractor under the Act of Congress of August 13, 1894, 28 Stat. 278, who, by reason of the contractor's default,

has been obliged to pay material men and labors, is superior to that of a bank loaning money to the contractor. In such case the surety is subrogated to the rights of the contractor."

In overruling the motion to dismiss, the Chief Justice wrote (208 U. S. 409): "Diversity of citizenship was alleged, but grounds of suit and relief were also based on statutes of the United States. Those Statutes entered as elements into the decision, and were necessary elements. Howard v. U. S. 184 U. S. 676; Warren v. Searle, 191 U. S. 195, 205."

The Howard case gives an extended list of citations, to the effect, that a suit upon a bond given under a Federal Statute and involving the question of the libility arising under such Statute, is a suit arising under the United States laws, and an appeal in such case lies to the Supreme Court.

In re Winn, 213 U. S. 458, the opinion is: "It is the settled interpretation of the words 'arising under the Constitution or laws of the United States,' that a suit arises under said Constitution or laws, when the *plaintiff's statement of his cause of action shows that it is based upon those laws or that Constitution.*"

If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, it is one arising under the law of the United States.

Northern Pacific R. R. vs. Soderberg 188, U. S. 526, 528.

The bill in this case seeks an ascertainment of what are the claims that have right of recourse on these bonds, within the meaning of the Act of Congress.

The Bill alleges (p. 3) "Each of said bonds was conditioned as required by Act of Congress of the United States, of August 13, 1894; 28 Statutes at Large, 278, * * * the exact condition being, that the Contract Co. should 'in all respects perform all and singular the conditions and agreements * * * and shall promptly make full payment to all persons who supply it labor or materials in the prosecution of the work.' "

Again, paragraph 2d, page 4, the bill pleads:

"2d. This cause presents a controversy arising under the laws of the United States relating to Government contracts and sureties, under the Act of Congress above mentioned. Your orator has a lien * * * upon a fund of over $27,000.00 in the hands and possession of the said M. J. Bray, Trustee, and acquired by said Bray as Trustee; and this (Circuit) Court has jurisdicition of this cause under Section 23a of the Act of Congress relating to Bankruptcy; and your orator has a claim against that fund, adverse to the pretentions and claims and possession of said Trustee. Of these funds $26,000.00 is deposited in * * * the Farmers & Mechanics National Bank of Parkersburg, in said Northern District of West Virginia, and within the jurisdiction of the Court; and this Court has jurisdiction of this cause under section 8 of the Act of March, 1875, relating to suits for the enforcement of liens and the assertion of claims, and the removal of clouds upon real and personal property within any district."

The Bill was framed to meet a complicated situation, and to insure that the grounds of jurisdiction should be made clear.

There were diverse citizenship, and federal questions; and a *local* jurisdiction fixed by the unrepealed

section 8 of the Act of 1875. We had the very exceptional case, of being obliged to institute proceedings in the Northern District of West Virginia, because the fund was located there, and the statute gave that right; but none the less, the surety's liabilities were wholly measured by the construction and application of the Contractor's-Bond-Act.

The number of cases which have gone from the Circuit Court of Appeals to the Supreme Court, regarding these bonds, and have there been decided on full hearing, is ample proof that the jurisdiction has been recognized and upheld.

U. S. Fidelity & Guaranty Co. vs. Golden Co., 191 U. S. 416.

U. S. Fidelity & Guaranty Co. vs. U. S., 204 U. S. 349.

Henningsen v. Fidelity Co., 208 U. S. 404.

Hill vs. American Surety Co., 200 U. S. 197.

Hardway v. National Surety Co., 211 U. S. 552, the latter case again affirming the lien on the fund, upon a bill filed by the surety, to apply funds and ascertain the liability. p. 555.

U. S. v. Ansonia Brass & Copper Co., 218 U. S. 452.

Title Guaranty & Trust Co., v. Crane Co., 219 U. S. 24.

At the last term (1910) the Henningsen case was reaffirmed and emphasized.

Standard Paint Co. v. Trinidad Co., 220 U. S. at p. 457.

The judgment of the Court of Appeals is not final in the sense of unappealable, unless the original jurisdiction of the Circuit Court, was dependent *entirely* upon diverse citizenship."

North Pac. R. R. Co. vs. Soderburg, 188 U. S. 526-8.

We submit the motion to dismiss is wholly without merit; and should be overruled.

Upon the Merits of the Appeal.

The exact point of the decision below, was, that the Circuit Court had no jurisdiction of the subject matter of the suit, because the Bill sought to "assert a lien upon", a fund in the hands of a Trustee in Bankruptcy, and this fund was in the exclusive jurisdiction of the court in Bankruptcy, and in custodia legis, under the orders of the District Court, *because in the possession of the Trustee.* Therefore, the Circuit Court had no power by its decree or order to interfere nor is this want of power, supplied by the order of the District Court, permitting complainant's Bill to be filed, for if the Circuit Court was without jurisdiction, the District Court is not authorized to confer it."

The concluding words above, refer to the order of the District Court in Bankruptcy (p. 62) granting leave to file the Bill and adjudging that the same "shall not be deemed to be in contempt or derogation of the powers and jurisdiction of this (District) Court, *but rather as ancillary thereto.*"

It is pertinent to observe that when on January 18, 1908, (p. 190), the Circuit Court granted a temporary ("until further order") injunction, against Mr. and Mrs. Eichel and M. J. Bray, restraining the prosecution of the multiplied suits brought by them against this Guaranty Co., that injunction did not touch the fund, because Bray and Eichel had brought these suits, not for the use of the Bankrupt estate, but for the purpose of fleecing their own surety, which stood surety for Bray's operations and Eichel's co-operation, after Bankruptcy, under the original contracts and bonds.

So tender was the Circuit Court of any unseemly clash with the District Court, which had invited and welcomed its aid, that on overruling demurrers, the decree (page 191) provided:

"This decree is without prejudice to any proceedings in Bankruptcy, and shall not be construed as preventing or interfering with any proceedings in Bankruptcy, in the matter of Evansville Contract Co., Bankrupt, before Honorable Thos. A. Brown, Referee, or in the District Court of the United States for this District; and the proceedings shall not, until further order, in any way interfere with the administration of the affairs and assets of said Bankrupt, by the said District Court * * or by the Referee aforesaid." (Rec. p. 191.)

As the orders in both the District and Circuit Courts were made by the same judge,—Hon. Alston G. Dayton, of the District Court,—we have a plain illustration of the principle on which both of those courts acted, which was, to further the ends of justice, if not by co-operation, at least by sympathy.

Much more was involved in this suit than the mere adjudication of the lien on that fund.

Eichel had familiarity with all the Bankrupt's affairs, contracted the debts and obligations; and knew the details. He had been instrumental in proving the amounts of what are known as the "preferred" or "material" claims (p. 39). Before the proofs by Eichel and others were heard, and before Eichel and Bray procured from the Referee an adjudication fixing the amounts of those claims, and their status, as being first entitled to payment in November, 1904, (Rec. 39) they had been buying them up at a sacrifice. Those debts are the same that claim recourse on the Guaranty Co's bonds.

After Bray and Eickels had gathered these claims, and after some one or more of them had, also, bought substantially all of the common debts, they found that there would be *nothing to apply on the common debts*, unless they could divert the funds from the preferred claims to the general creditors (themselves); and then, to realize on the preferred claims held by them, they conspired to make this surety pay these material claims, without benefit of the applicable fund. The situation was surprising, but not difficult to analyze, as detailed in the bill.

1. The Guaranty Co. was on four bonds for the Contract Co. of aggregate penalty of $200,000, covering four separate jobs.

The surety knew none of the creditors or details; or the extent of its liabilities. It had none of the books or papers. It had a lien by contract and by operation of

law, upon the plant and moneys payable on the contracts; and, could have taken hold and saved itself; but the creditors thought a great profit could be realized by completing these contracts; and this could be done if $75,000 capital could be raised.

The trustees so represented in their Petition of March 17, 1904. (Rec. 167 to 175.) *A creditors' meeting* and the Referee decreed, on April 11, 1904, that the Trustees might borrow $75,000 on Receiver's certificates, which should be a first lien on all the assets of the Bankrupt estate, and that they should finish the contracts; and fully and completely release and save harmless any and all sureties who may have guaranteed the completion of said contracts. (pp.23-7.)

3. The Guaranty Co. was unwilling that the material claims (supposed to be about $40,000) should be superseded or undercut by $75,000; and was, also, unwilling to allow the Trustees to finish the works, *unless the Guaranty Co. should be indemnified;* while Eichel who was fully trusted, assured them of safety, and that he would see that all these material and labor claims should be paid, if the Guaranty Co. would assent.

4. The main common creditors were Banks. The Guaranty Co. agreed to permit the Trustees to go ahead, as the creditors had planned, if these banks would furnish an indemnity for the aggregate of the $75,000, which the Trustees proposed to borrow (26); and the five Indiana Banks, and two West Virginia banks, did give that bond, each contracting for not exceeding 65 per cent. of its own debt. (27-29.)

5. That left the Guaranty Co. still liable to the government and material men, even under the management of the Trustees; and the Guaranty Co. waived the priority of its claims on the funds, to the extent of the moneys borrowed by the Trustees, not exceeding $75,000.

6. The Trustees finished the contracts and paid off *all moneys they borrowed;* and there was a balance of some $27,000, in the hands of Bray, who had become sole Trustee.

7. At that stage, the Guaranty Co. was liable for these original material claims, which the order of March, 1904 had required them to pay off, and which the Guaranty Co. had a right to have paid off, by applying the fund on hand; and if that was insufficient, the Guaranty Co. had the indemnity agreement of the Banks.

The banks were interested to have that fund applied to their relief.

8. But the trustees would not pay these material claims, and then a petition was filed in the Bankruptcy court, in February 1906, to require the application of that fund, and an ascertainment of what was due to the material men; and the Guarantee Co. asked that the amount, if any, chargeable to the Banks, should, also, be ascertained. The Bankruptcy Court lead no power to decree upon the equities between the parties. (p. 13).

All of these "preferred claims" had been presented before the Referee, with evidence of assignments to Mrs. Eichel. (p. 11.)

9. But Bray (p. 15) caused suits to be brought on

these claims, for the ostensible use of Mrs. Eichel, in Pennsylvania, in March and August, 1907. (Rec. 11, 14.)

10. Next, the Guaranty Co. discovered on September 5, 1907, that these claims had been bought at a discount, and some were unjust, and it could not get at the facts, being fraudulently pursued by those who should have protected the surety. (Rec. p. 10, 12.)

11. It then filed this bill, Sept. 21, 1907, making defendants the seven indemnitor banks, and Bray as Trustee and in his own right (p. 191) and Eichel and wife; and, also, impleading two owners of material claims that had not been assigned, bringing before the Court, all parties interested in this fund, on which the lien was claimed.

The *object of the suit was single*, to settle the amount of the Guaranty Co.'s liability, by ascertaining what the material debts were; to apply the fund for their payment, and to fix the amounts that the Banks should pay by way of indemnity, and to enforce the surety's right to be exonerated, compelling these parties to resort to this primary fund, and to enjoin the suits brought for the same causes of action.

Hence, when the learned court of appeals supposed that the object of the Bill was solely to enforce a lien upon the fund, the larger aspects of the case were not comprehended.

The complainant was entitled to go into equity, for "full, adequate and complete" relief, and in a court that was capable of affording it.

The assignments of error, (P. 221).

All go to substantially the same point—the dismissal of the Bill, sustaining the demurrers, and dissolving the Injunction.

POINTS.

1. The Guaranty Co. had a lien upon and claim to the fund of $27,600, and especially on $26,000, on deposit in the two banks in the Northern District of West Virginia, both of which banks are made defendants, and served with process, as citizens and residents of said District.

2. The Circuit Court of that District had jurisdiction of a Bill filed to enforce that lien and claim, under section 8 of the Act of March 3, 1875, 18 Stats. 472.

3. The Circuit Court was not deprived of that jurisdiction, by reason of the fact that the fund was in the hands of a Trustee in Bankruptcy, who was appointed in that District, and deposited the money in those West Virginia Banks.

(a) The Maryland complainant had a claim adverse to the Trustee, and would have been entitled to enforce that claim against the Bankrupt Corporation of Indiana, if Bankruptcy proceedings had not been instituted, under section 23a of the Bankruptcy law, which is pleaded at page 4 of the Bill.

(b) The Bankruptcy Court had no exclusive control of the fund, other than the constructive possession in every case created by adjudication.

(c) If the Statute (section 23a of Bankrupt Law) did not in terms apply, the permission of the District

Court to file the Bill, would save question; because the act of the District Court in aid of Justice, was not the creation of a power or jurisdiction, but a clearing of the way for its exercise.

(d) Independent of statute and of the District Court's sanction, the Circuit Court has jurisdiction of a Bill under this "local action" statute, to decree a lien with regard to a fund in the course of administration by any court, in the District.

4. The Circuit Court had jurisdiction to grant the injunction and to require the parties who were seeking unconscionable advantage, to exhaust the fund, which was the primary fund by operation of law, by order of the Bankruptcy Court and creditors, and by the agreement of the parties.

5. It was error to sustain the Demurrers, to dissolve the Injunction, and to dismiss the Bill.

I.

The complainant had a lien on the fund of $27,600, of which $26,000 was in the Second National and in the Farmers and Mechanics National Banks, in the Northern District of West Virginia.

This money was made up of amounts retained and ultimately paid over, by the Government on the contracts, and proceeds from the sale of plant, apparatus, etc. of the Contract Co., made after all the work was done.

This lien came from several sources:

1. By the agreement of Indemnity given by the Contract Co. (Exhibit A. Rec. p. 5, 19).

"In the event of Contract Co. being unable to complete or carry on the contract, *to assign and does hereby assign such plant as it may own or have upon the work* . . . . and the Guaranty Co. shall be subrogated to all its (Contract Co.'s) rights and properties, as principal in said contract; *and that deferred payments* and any and all moneys and properties that may be due and payable to it, at the time of such breach or default, or that may thereafter become due and payable to it on account of said contract shall be credited upon any claim that may be made upon the Guaranty Co. under the bond."

2. By operation of law, independent of agreement.

3. By the orders in Bankruptcy, passed at creditors meetings, under adjudication of the Referee, as follows:

(a) April 11th, 1904, Trustees certificates were authorized to amount of $75,000, "which shall be a first lien on all and singular the property of the Bankrupt; provided that nothing in this order shall in any wise *prejudice or affect liens that exist.* (Bill p. 6, Exhibit D p. 24) . . . . the Trustees shall pay the premiums accruing to sureties on bonds given to the government . . . They are directed and authorized . . to carry said contracts to full completion, to collect the contract price, together with all percentage retained by the United States, and to fully and completely *release and save harmless* any and all sureties who may have guaranteed the completion of said contracts." (25-26).

On the faith of this action of the creditors and their court, the Guaranty Co. agreed to let the Trustees take hold, and to allow the Trustees to borrow $75,000, to be

a lien prior to that of the Guaranty Co., upon "the assets of the Bankrupt."

The Guaranty Co. remained liable still to the government, until all the conditions of the Bonds should be performed; and the premiums were to be paid. (p. 26.) The Guaranty Co. therefore was a surety for Bray, Trustee, and for Eichel, who was employed by creditors at a salary of $6,000, to assist. (p. 24.)

(b) On November 19th, 1904, at a creditors meeting, Mr. Geo. W. Johnson, then Referee, presiding. Present: *Philip W. Frey*, counsel for the Trustees, and *M. J. Bray*, C. D. Dotson and A. Heine, Trustees. (p. 35-6 Exhibit G.) "The Trustees (p. 39) called up for consideration the claims which have been filed herein as *preferred* ones, and examined *Jacob Eichel* and Alfred Heine for the purpose of ascertaining the preferred claims herein, *about which there is no controversy*, and it appearing from said testimony that the following claims are *preferred claims*, in this Bankruptcy, the same are established in this decree as claims of that character. (p. 39.)

(Here follow claims aggregating over $35,000, including those on which the numerous suits were brought in Pennsylvania, and of which complaint is made.)

(c) On December 12th, 1904, P. W. Frey (counsel for the Bankrupt estate) gave a notice to Bray, Trustee, "that the following claims have been established as preferred claims payable out of assets, first after costs of administration . . which preference was established by decree of November 19th, 1904. p. 107-8. (Here follows list.)

These claims were listed by Bray, commencing May 31st, 1904, as "Frey accounts." (p. 105.)

On December 31st, 1906, a contract is made purporting that Laura Eichel has become the owner of these claims, and that they shall be held for Bray, who shall divide with her the profits on $35,663, costing $27,037. (p. 107.)

Bray understood these claims were first preferred and to be paid out of the Bankrupt estate, (p. 99) just as stated in Frey's notice to Bray, *and Bray became successor of Frey as to these claims.* (103) The Bill charges these facts at pages 10 and 11.

4. A fourth ground of lien is charged in the Bill, that by the contracts (p. 3) between the Contract Co. and the United States, a certain per cent of the money should be retained until completion; in case of default, the government should have the right to take possession of the plant and work and prosecute the contracts to completion.

The Bill asserts this lien and subrogation of the surety, (page 5) and alleges that the plaintiff has every right of the Government for its protection, and every right of the Contract Co. against the government, and all rights of material, men, etc.

All of these sources of lien have been adjudged, in other cases cited below and certainly, Bray and the Eichels are estopped to deny the lien. The demurrer admits, of course, that Mrs. Eichel's name is fraudulently used, merely as a mask for the others—Stat nominis umbra.

On general equities, apart from express contracts, "the surety on the Bond of a public contractor conditioned in compliance with the Act of August 13th, 1894 (28 Stats. 278) . . . has an equity, under the doctrine of subrogation on the sums due from the government under the contract, which is superior to the claim of a bank under an assignment from the contractor to secure money loaned, etc."

Henningsen v. U. S. Fidelity & G. Co., 208 U. S. 404.

The right of the surety to compel the application of money owed by the government, to the material and labor claims for which the surety is liable, will be enforced in equity without waiting until the surety has in fact paid the claims. The surety has an equitable lien for its exoneration.

Hardaway v. National Surety Co. 211 U. S. 552.

In this case below, 80 C. C. A., 283, 291, the opinion by Circuit Judge Lurton, affirms the decision of Judge Evans, who suggested that the right might find support, if needed, in Revised Statutes, Sec. 3468, providing: "Whenever the principal in any bond given to the United States is insolvent, any surety on the bond who pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent, and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon," that the government has.

But we do not need the help of that statute.

In Prairie State Nat. Bank vs. United States, 164 U. S. 227, the syllabus is:

"A surety who completes a contract with the United States on the contractor's default, is subrogated to the rights which the U. S. might assert against a fund created by the retention of 10 per cent of the sums estimated . . . in order to insure its completion; and this right relates back to the making of the contract and is superior to any *equitable lien* asserted by a Bank for moneys advanced, etc.

This case has been several times applied as we claim.

Hardaway vs. Nat. Surety Co. (Supra.)
First Nat. Bank vs. Trust Co., 52 C. C. A. 313.
In 2d Brandt on Surety (3d Ed.) Sec. 360,—(A. D. 1905).

"The surety on a Government building contract may maintain a bill to prevent the application of the contract price to the payment of the contractor's general creditors, when the effect of such application will be to leave the labor and materialmen, for whose claim the surety is liable, unpaid, and this applies as to funds in the hands of the Government."

This author cites Richards Brick Co. vs. Rothwell, 18 App. cases, D. C. 516, reported in 29 Wash. Law. Rep., page 691.

The court had previously, in the case of Marble Co. vs. Burgdorf, 13 App. Cases, D. C. 507, 519,—27 Wash. Repts., 35,—construed the Act of Congress of 1894, saying: "The practical effect of the statute is to confer a *special lien in favor of* each of such persons furnishing

labor and materials, and to substitute the bonds in the place of the building as a thing upon which that lien is charged."

The court by Judge Alvey holds, in Richards Brick Co. vs. Rothwell, 18 App. Cas., D. C. 516: "There is, therefore, by necessary implication, *an equitable lien and preference secured in favor* of the parties who furnish labor and materials in the execution of the contract, in the application or distribution of the contract price remaining to be paid; and where the Government, as in the present instance, holds in its hands any part of the money contracted to be paid for the work, and there remain unpaid claims for labor and materials supplied, *it holds such fund as quasi trustee for the benefit of those entitled to receive it under the condition in the bond;* that is to say, the laborers and material men remaining unpaid. This right to preference being the result of the operation of the statute and condition of the bond, *it is the clear right, upon the plainest principle of justice*, of the sureties in the bond, *to invoke a court of equity to enforce the preference and equitable lien for their protection.* In construing this act of Congress of August 13th, 1894, this Court said, in the case of the Marble Company vs. Burgdorf, 13 App. D. C. 507, 519; 27 Wash. Law Rep., 35: "The practical effect of the statute is to confer a special lien in favor of such persons (parties furnishing labor and materials) and to substitute the bond, in the place of the public building, as the thing upon which that lien is charged.' That is to say, the bond is liable rather than the building upon which labor and materials are used in construction; and if the sureties should pay claims for such labor and materials for which they may be responsible on the bond, they have a right, upon well settled principles of substitution, to such claims as against the contract price of the work remaining due to the contractor. *And having such right of substitution, the sureties have*

a right to interpose to prevent the diversion or misapplication of the fund, and to require it to be paid out to the parties entitled to receive it in the first instance, by virtue of the lien and preference given by operation of the statute."

The lien on the fund in the government's hands, has, since the decisions in the district of Columbia cases, been fully established in the Supreme Court.

AS TO MONEYS NOT DERIVED FROM THE GOVERNMENT.

The trustees treated the whole estate as a unit. The retained percentages were about $36,000; and the net receipts from all other sources were about $64,000 and after paying off borowed money (certificates) there is a balance of $27,600. (Rec. p. 5; also 21.)

The plant at Dam No. 18, in the District, realized $61,000 so that substantially all of this $27,600 consists of retained percentages and proceeds of plant, on which a lien is given by Exhibit A. p. 19.

When, therefore, the Contract Company went into Bankruptcy; the government and the surety were entitled to take possession of the plant and finish the contracts, and the plant was assigned to the surety.

The surety was entitled to assert that right and property, for its indemnity, against the Bankrupt and against the Trustee.

The Trustee has no better or higher right than the Bankrupt.

York vs. Cassell, 201 U. S. 344.

Thompson vs. Fairbanks, 196 U. S. 516.

Humphrey vs. Tatman, 198 U. S. 91.

Hewitt vs. Machine Co., 194 U. S. 294, 56 C. C. A. 383.

All the more does that lien exist, when the court in Bankruptcy, by agreement of all creditors, and especially by the procurement of Bray and Eichel and Frey, decreed in April, 1904, that the surety should be relieved, (p. 24-27.) and in November, 1904, adjudged that these particular claims be paid. (p. 39.)

They are estopped to deny the right of the complainant to have the fund applied to the relief of the surety, by estoppel in pais if not by record.

Whatever an innocent purchaser might claim in this case, Mr. Bray, the owner, and Mrs. Eichel, nominal holder, of these claims, are estopped. Counsel Frey notifies Bray in writing, that the funds in Bray's hands is the primary fund, under court orders; Bray paid for the claims, and the suspicious industry of serving this notice on Bray, rivets the status of the claims in the hands of the present holder.

II.

The Circuit Court of the District where the money was located, had jurisdiction under Sec. 8 of the Act of 1875, which was pleaded in the bill, and followed as to procedure.

This was a suit "to enforce a legal or equitable lien upon and claim to personal property within the District . . . ", within the letter and intent of the section quoted,

which still remains in force and was saved from repeal by section 5 of the Act of Aug. 13th, 1888. The effect of this unrepealed section 8 of the Act of 1875 is to give jurisdiction "*in local actions,*" regardless of the district of residence or of citizenship of any defendant, provided only that there was diverse citizenship or other ground of Federal jurisdiction, and that "the suit be one to enforce a lien or claim upon real estate or personal property, within the District."

In Greeley v. Lowe, 155 U. S. 58, 72-3—Mr. Justice Brown, in the opinion p. 73, cites Goodman v. Niblack, 102 U. S. 556—"In which it was held, that where a bill was filed to enforce a claim or lien *upon a specific* fund within reach of the court, and such of the defendants as were neither inhabitants of or found within the district, did not voluntarily appear, the Circuit Court had the power to adjudicate upon their right to, or interest in, the fund, if they be notified of the pendency of the suit by service or publication in the mode prescribed by Rev. Stat. Sec. 738."

Again (155 U. S. 73): "The Act of 1875 gave the right to sue defendants wherever *found*. The Act of 1888 requires that they shall be inhabitants of the district. But in both cases, *an exception is created in local actions*, wherein any defendant interested in the *res* may be cited to appear and answer, provided he be not a citizen of same state with the plaintiff."

The Circuit Court of the United States for *Arkansas* has jurisdiction of a suit in equity brought by a citizen of *Ohio* against a citizen of *Illinois*, regarding property in Arkansas.

Dick vs. Foraker, 155 U. S. 404.

The decision is by Mr. Justice White, (p. 410): "The suit was one to remove a cloud from title to real estate situated in the district where the suit was brought. The defendant was a citizen of another state. The case was obviously within the jurisdiction of the Court."

In Citizens Savings & Trust Co. vs. Ill. Cent. R. R. 205 U. S. 46, a suit by owners of railroad stock, for the cancellation of deeds and leases, under and by authority of which the property of the Company are held and managed, is a suit within the meaning of section 8 of the Act of 1875, and may be brought in the District where is the property to be affected.

In Jellinik vs. Huron Co., 177 U. S. 1, 10, the suit was by stockholders to remove a cloud upon their title to certain shares of stock. The Supreme Court held that the question had regard to the equitable title to shares in a Michigan corporation; that the locus or situs of the stock was in Michigan, and the case was within section 8 of 1875.

The two cases last cited, each gave the emphasis of reversal, in upholding the right of a complainant, under this law, to resort to the District *in which alone there is jurisdiction* to adjudicate and fix the status of property, regardless of whether any party resides therein or not—treating the proceeding as one in *Rem*.

The recent expressions of the Supreme Court denying the right of a citizen of West Virginia to maintain a suit in Tennessee to enjoin a citizen of New Jersey from allowing noxious vapors to escape from lands in Tenn-

essee, cut very clearly the exceeptional character of cases within this Act—denying the jurisdiction, as a suit to enforce a lien or claim upon property, because the complaint of a nuisance issuing from land in Tennessee, was not a claim to the land.

Ladew vs. Tennessee Copper Co., 216 U. S. 369.

This money was physically within this District. The Bill so alleges; but if refinements are sought, then the stock cases above cited (177 U. S. 1, and 205 U. S. 46) settle the locus within the meaning of the statue, which requires service on the persons in possession, within the district, the two Parkersburg Banks, and substituted service as to others.

Where there is no dispute, (upon demurrer,) that the fund is actually within the Northern District of West Virginia, on deposit in two (domestic) Banks, within the shadow of the Court House, there is no room for controversy as to the jurisdiction in rem, because it is "obvious."

Dick v. Foraker, 155 U. S., p. 410.

The case of Macon Grocery Co. vs. Atlantic C. L. R. Co., 215 U. S. 502, and that class, holding, that where there is a federal ground of jurisdiction, the suit must be brought in the District of defendants' residence, can have no application, where suit lies under this local action statute, of Sec. 8, of the Act of 1875.

The locus or situs of the Res, in such cases settles the District for the suit, as demonstrated in Greeley vs. Lowe 155 U. S. pp. 72, 73-4.

III.

The Circuit Court is not deprived of the jurisdiction conferred by Sec. 8 of the Act of 1875 (18 Stats. 472) by reason of the fact that the fund was part of a Bankrupt estate; deposited in two West Virginia Banks, by a Trustee of the Bankrupt.

The learned Court of Appeals held the reverse of this proposition, and on that ground dismissed the Bill, and adjudged that the District Court in Bankruptcy had exclusive jurisdiction.

If it were thinkable that the District Court in Bankruptcy had power to do more than to administer the assets of the Bankrupt; if we should assume that the Court in Bankruptcy could settle and adjust the liabilities of this surety, and apportion the loss among the indemnitors, and protect the *assets of this surety and to relieve this surety from fraud on its rights; if*, in short, the Court in Bankruptcy could entertain the present Bill and grant all the relief prayed, it would still be true, that the Circuit Court has jurisdiction.

The rule of comity between *State* and Federal Courts, has hardened into fixed law, and rests on peculiar reasons, growing out of our dual sovereignties.

The opposing brief, filed over two years ago, on the motion to dismiss, ignores the real point so ably presented in the cases it cites; that as between *State* and Federal Courts, the seizure or taking possession by one court of any property, places it as much beyond the reach and jurisdiction of the other, as though the res had been translated "to another planet."

Thus, in Shields vs. Coleman, 157 U. S. 169, "The Circuit Court of the United States, when property is in possession of a Receiver appointed by a *State* Court, has no power to appoint another receiver and take the property out of the former's hands."

So, in Freeman (U. S. Marshal) vs. Howe, 24 How. 450, "*in the case of conflicting authorities under a State and Federal process,* on which property has been seized, the question as to which authority shall for the time prevail * * * depends upon the question which jurisdiction had first attached, by seizure and custody."

Louisville Trust Co. vs. Knott, 191 U. S. 225, decides, only that the jurisdiction of a Circuit Court is not in issue, so as to furnish ground *for an appeal direct to the Supreme Court,* where the question was "Whether a Federal Court, under the principles of equity and comity governing all courts having concurrent jurisdiction over the same subject matter, has authority to administer a trust estate, after a suit with reference thereto has been begun in a *State* Court."

Clashes between State and Federal Courts, if allowed, would lead to unfortunate results, and are more likely to happen because of inherent tendencies to conflict.

But after all, the Courts as instruments of justice, may be expected to be chiefly concerned about what is right.

There is no reason to suppose that a Federal Court will obstruct justice where a State Court is seeking to administer it, or that it will not aid proceedings to right-

eous ends, where there is manifest hardship, even where it cannot directly exercise jurisdiction.

On this principle, the Supreme Court has in various ways, warned subordinate tribunals, to exercise a liberal discretion in favor of awarding relief, for injustice occasioned by the action of Federal jurisdiction. Sanction has been given, by summary proceeding, or by Petition or plenary suit, to mould the remedy, so as to correct the consequences of the conduct of any Federal officer, or the operation of any writ, which on some technical question of exclusive jurisdiction, would otherwise work wrong or oppression; and the doors of the Federal Court are always open, for the exercise of this ancillary jurisdiction.

Krippendorf vs. Hyde, 110 U. S. 276.

In Gumbel vs. Pitkin, 124 U. S. 131, care was taken to disabuse the impression that a Federal Court had no power to deal justly as to any property in its hands, or that it would turn a deaf ear to a righteous claimant, simply because his citizenship did not put him within the circle of the actual parties.

In the Gumbel case, it was held—that where the Federal Court had in its custody a fund arising from the sale of property in the possession of that court, it was the duty of the Circuit Court to give to one who had sued out an attachment, subsequently, *in a state court*, the benefit of the lien that he had acquired under his attachment—"to give to A. priority, *as if* he had been permitted to make an actual levy under his writ." The opinion says (p. 154):

"Where, under a writ of attachment, the marshal of the United States has first seized property and taken it into custody, the exclusive jurisdiction of the Circuit Court is established over it and over all questions concerning it; but *it ought not to follow that the property is thereby withdrawn from the assertion and enforcement of claims against it*, by those who must necessarily pursue their remedy in the first instance in a state court. A creditor residing in the same state with the defendant and, therefore, required to institute proceedings in the state tribunal, ought to be enabled, by his writ of attachment, to subject the property of the debtor in due course, and according to the order of priority, even though when the sheriff proceeds to execute the writ he finds that property in the possession of the marshal of the United States, and, therefore, subject to the jurisdiction of the federal court. In that case no rule of law or of convenience is violated if he is permitted, by service of notice upon the marshal, to make a constructive levy upon the property, subject to all prior liens, and without disturbing the marshal's possession."

And the conclusion of the case, at page 156 (124 U. S.) is:—

"The case, therefore, stands thus: For the seasons growing out of the peculiar *relation between Federal and State* courts exercising coordinate jurisdiction over the same territory, the Circuit Court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, and to decide all questions of conflicting right thereto; the plaintiff in error having pursued his remedy by action against his debtor in the state court, to which alone by reason of citizenship he could resort, attempted the levy of his writ of attachment upon the goods in possession of the marshal; not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee; not being able by this process to subject the mar-

shal to answer personally to the state court, *he made himself a party to the proceedings in the Circuit Court by its leave*, and proceeded in that tribunal against its officer and the creditors for whom he had acted; on a regular trial it appeared as a fact that at the time of the notice the marshal was in possession of the property wrongfully as an officer, and therefore chargeable as an individual. *It was competent for the Circuit Court, and having the power, it was its duty*, to hold the marshal liable as garnishee, and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties on the footing of these rights, and give to the plaintiff in error the priority over all other creditors, to which, by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled."

If the fact that a trustee in Bankruptcy holds property of a bankrupt estate, brings that property within the exclusive control and jurisdiction of the District Court, so that no suit can be brought outside of the District Court with regard to it; then sec. 23 (a) of the Bankruptcy law, is without effect or meaning;

"The United States Circuit Court shall have jurisdiction of all controversies * * * between Trustees as such and adverse claimants, concerning property acquired or claimed by the Trustees in the same manner and to the same extent only, as though Bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants."

This statute was aimed to allow jurisdiction to *state* courts, as well as to Federal Circuit Courts, where the claimant might have sued in the Circuit Court, if bankruptcy had not intervened, and if such controversy had been maintainable between the claimant and the Bank-

rupt. It gives jurisdiction independent of the Federal character of the Trustee and of the Bankruptcy. It recognizes the right of a party to a plenary suit, in a controversy with a Trustee, to resort to a regularly constituted court, state or federal, as the case may be, having full powers, regularity of sessions, of maturing causes, and of process and proceedings.

Sec. 23-a allows a suit against a Trustee where it might have been maintained between the claimant and the Bankrupt.

Bush vs. Elliott, 202 U. S. 477.

The Contract Co. was an Indiana corporation and Bray a citizen of Indiana. The complainant is of Maryland; the property in West Virginia; and the liability and rights of the surety, and the right to the lien, present a Federal question, involving the construction and application of the Act of 1894. The District Court has no exclusive control as claimed. If it had, its permission removed that objection.

In Frank v. Volkommer, 205 U. S. 521, the point adjudicated was, that the possession by a court of Bankruptcy of the proceeds of a chattel, covered by a mortgage given by the bankrupt, does not deprive the State Court of jurisdiction of a suit to set aside the mortgage as fraudulent.

Mr. Chief Justice Fuller writes (205 U. S. p. 526): "Counsel for plaintiffs in error contended below, that the State Court had no jurisdiction, because the suit was brought to determine title to property or a fund in the possession of the District Court of the United States."

At page 528, "undoubtedly the State Court in which the Trustee brought this suit was the court where the bankrupt * * * might have brought or prosecuted 'if proceedings in bankruptcy had not been instituted,' and its jurisdiction under the applicable rule must be conceded; but the plaintiffs in error *contend that the possession by the Bankruptcy Court of the proceeds of sale of the mortgaged chattels, deprives the State Court of its conceded jurisdiction to set aside the mortgage as fraudulent.*"

"The contention is wholly inadmissible."

Again at page 529: "No principle of comity was violated and there was no interference with the bankruptcy court. First National Bank v. Title & Trust Company, 198 U. S. 280; Davis v. Friedlander, 104 U. S. 570; Eyster v. Gaff, 91 U. S. 521; Chaflin v. Houseman, 93 U. S. 130, Re Platteville Foundry & Machine Company, 147 Fed. Rep. 828; Guaranty Trust Company v. North Chicago Street Railroad Company, 130 Fed. Rep. 801; Re Spitzer, 130 Fed. Rep. 879; Bindseil v. Smith, 61 N. J. Eq. 645; Skilton v. Coddington, 185 N. Y. 80. In the latter case the Court of Appeals by Cullen, C. J., in sustaining the jurisdiction of the State Court, admirably expounds the applicable principles, with a full citation of authorities. That was *a suit against the trustee*, while the present case was brought by the trustee. "The possession of the temporary receiver of the special fund was not, in the circumstances, in any sense sufficient to change the ordinary rule giving the state courts jurisdiction, any more than the constructive possession in every case created by adjudication. Mueller v. Nugent, 184 U. S. 1; York Mfg. Company v. Cassell, 201 U. S. 344."

The decision in the Skilton case, 185 N. Y. 80,—so strongly commended above by the Supreme Court, is—

"Where a Bankrupt's Trustee sold property of the bank-

rupt which was subject to a chattel mortgage, and reserved amounts to pay liens on the property, the holder of the chattel mortgage was entitled to sue the Trustee, in a State Court to establish his claim on such note and mortgage; and a judgment in such suit in a State Court, in favor of the chattel mortgage, could not operate to take the fund from the possession of the Bankruptcy Court."

Loveland on Bankruptcy (3d Ed.) 123.

Collier (6th Ed.) p. 281.

The permission of the District Court removes all question of clashing jurisdiction.

Before this Bill was filed, the District Court had authorized it (p 62) and that is alleged in the Bill (p. 17). In the absence of statute, it is not proper to proceed against a Receiver or property in his hands, without leave of the court that appointed the Receiver.

But where the court which appointed the Receiver, gives permission to sue him, or to proceed against such property, it cannot be an invasion of the jurisdiction thus to proceed.

Re Watts & Sachs, 190 U. S. 1, 27.

Foster's Prac. (4th Ed.) p. 44.

In the case at Bar, the complainant had statutory authority under sec. 23a, and from abundant caution, also applied for leave; and all this, regarding a question between two federal courts. One of which had no power whatever, to do more than merely administer a fund and pay it to the proper party; and the other being authorized by statute to make an adjudication as to all parties.

Sec. 8 of the Act of 1875, is confined to "Circuit Courts". Only a Circuit Court could decree the lien, issue an injunction, and convene all the parties interested in this fund, and settle the entire controversy.

Waukesha Co., 116 Fed. 1011.

Shainwald vs. Lewis, 5 Fed. 517.

The Circuit Court had jurisdiction independent of Sec. 23a, and of the District Court's permission.

For this proposition, we have ample authority in Ingersoll v. Coram, 211 U. S. 335,

Col. Ingersoll's administratrix brought suit to enforce a lien upon a fund which was under the administration of a State Court of Massachusetts. The claim was that the fund actually within the territorial limits of that District, was excluded therefrom, by reason of the fact that it was under the control of a state court; so that, in contemplation of law, it was not in the District at all. The opinion (211 U. S. 358) sustained the jurisdiction, and used these words:

"The decree deals with the parties. It adjudges what contract they made, the extent of their obligation, and how that contract was secured * * * No action of the probate court of Suffolk County is attempted to be restrained, limited or trenched upon, nor the property in its possession disturbed; and yet it is urged, that the suit that sought this purpose, and the decree that executes this purpose, transcend the jurisdiction of a Circuit Court of the United States. * * * The respondents especially rely upon the pendency of the proceedings in the probate court of Suffolk County, and as a corollary, that the property was in the probate court, and under its jurisdic-

tion, *and therefore not in the jurisdiction of the Circuit Court.* * * * * A lengthy discussion is not necessary. The controversy presented by the bill was only between citizens of different states, and there was that ground of jurisdiction in the Circuit Court, being a court of the United States."

"*One object* of the bill of Ingersoll's administratrix was to declare and foreclose a lien upon property within the District, *and there was that ground of jurisdiction;* and we do not think *that jurisdiction thus established and supported, was taken away,* by the mere fact that the settlement of the estate was pending in the probate court of Suffolk County. No interference with that court was sought or decreed as we have seen * * * The cases of which Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, is an example—does not apply; but the case falls within the principles announced in Payne v. Hook, 7 Wall. 425; Byers v. McAuley, 149 U. S. 608."

If it were true that the District Court had jurisdiction to convene the parties and protect and enforce all the contracts relied on by the appellant; still, that jurisdiction would not deprive the Circuit of powers specified in the statute; nor could the District Court shelter its Trustee, and deprive all other courts of power in the premises, on the ground of exclusion.

The District Court in our case refused to take that position; and it would not have been maintained, against the decisions of the Supreme Court, and this Sec. 23a.

IV.

The Circuit Court had jurisdiction to enjoin Bray and others against multiplicity of suits and unconscionable advantage and oppression, and to compel them to exhaust the primary fund, out of which the surety was entitled to be exonerated, by order of the Bankruptcy Court and creditors, by the contracts and agreements of the parties enjoined, and by recognized equitable principles.

The express agreement of the Contract Co. to indemnify the surety, is very broad—"to indemnify and save harmless the said Company, against all loss, costs, damages and expenses whatever * * *."

This feature makes the rights of the Guaranty Co. greater than such as arise from the mere relation of surety.

1 Brandt on Suretyship, Sec. 242.

Eichel gave assurance that the Guaranty Co. should be protected against any liability on these claims. (Rec., par. 9, page 9.) Bray was ordered to pay these claims out of first moneys (pp. 25-6), and this company stood as his surety to the government for years. Eichel was employed to assist the Trustee. (Rec. pp. 24-5.) "The name of Laura Eichel was used as a mere mask and cover for the real parties to the fraud upon your orator. Mr. Bray is the real owner of the claims, and he caused the suits in Pennsylvania, in fraud of your orator and in violation of conscience and good faith," and these facts were discovered only sixteen days before filing the Bill. (pp. 11-12.)

"That all of those suits have been brought for the use of Bray for the purpose of harassing and oppressing the surety, of multiplying suits and proceedings, and to avoid the application of the primary fund in his hands * * * . Bray and Eichel have control of most of the claims. They control the trusteeship and the right to redress frauds on the funds. They have corrupt interests to subserve * * * they have interferred with your orator's indemnitors, stirring trouble and creating embarrassments." * * "They have conspired to not only deprive your orator of the right to apply the fund to just claims for material, but to compel your orator to pay claims that are unjust, and to divert the fund to unsecured claims in which Bray and Eichel are interested. (p. 15.)

"This is the only court (p. 15) that can afford full, adequate and complete relief in the premises, ascertaining what amount should be paid to each, and by whom, and enabling your orator to ascertain its liability, and to have the same satisfied, out of the funds, and by the indemnitors.'

All the borrowed money has been paid in full to certificate holders, *so that the question as to cetificates is wholly eliminated;* and there is no lien on the fund except these material claims. The grounds of equity are recapitulated. Par. 19th, p. 17.

We submit that the appellant was entitled to be *exonerated*, and to stay those numerous suits, so that these claims be paid out of this primary fund; and all matters settled.

What court could do that? It must be a court having jurisdiction of fund, and power to adjudicate upon it, and convene the parties interested;—a court able to adjust equities and make its decrees effective for or against

every party in interest, as his right may appear. This surety had the right to try out the liability of the two Parkersburg Banks, at least, who were on the indemnity agreement of April, 1904, each for less than the amount of its claim; and if the Indiana Banks would come in, their liability could be settled at the same time. These Parkersburg Banks situated in this district, are made domestic, by act of Congress.

If Bray should desire to contest for the full amount of these material claims, held by him (105-108), he could prove them in this one suit.

What court except this Circuit Court, could fix the amount of the surety's liability, apply the fund upon it, and assess the Banks for the excess, if any?

This being the proper court, it may exercise all powers incidental to effecting complete relief, as by enjoining a multiplicity of suits, and make Bray take his pay out of money in his hands.

The demurrers all object *that suits are pending involving the same question;* but how could the familiar practice of enjoining suits be exercised, if the pendency of such suit could be a bar or objection?

It would be absurd, to refuse to enjoin thirty suits, because they are pending.

It is a principle that the Court that enjoins legal proceedings, must be in position to do justice, itself. This, the Circuit Court can do, because it can decree upon this fund, and if that does not satisfy just claims, it can decree for the excess.

No court in Pennsylvania can do that, because while the suits are there, no fund is at hand.

Pennsylvania had nothing to do with anything or party in this case.

If suits have been multiplied by a Trustee to the prejudice of his cestui que trust and *surety*, to take unconscionable advantage of the surety, a court of equity must intervene and prevent the prosecution of the suits, until at least a fair effort has been made, to compel the fiduciary to act justly.

THE LAW OF EXONERATION.

1 Brandt on Suretyship, Sec. 245, states the rule:

"After the debt for which a surety is liable has become due, he may, *without paying the debt and without being called upon by the creditor*, file a bill in equity to compel the principal to pay the debt, it being unreasonable that a surety should always have a cloud hanging over him, even though not molested for the debt. This principle is universally recognized and has been applied in a great variety of cases." Again at Sec. 497, "the surety who fears the loss or destruction of the property by which the principals debt is secured, may without paying the debt or exhausting other remedies, resort to a court of equity for the purpose of preventing it."

In American Water Works v. Home Water Co. 115 Fed. 171 at page 182, the court said: "The trustee may refuse to take any steps to prevent the destruction of the security, by reason of the fact that its debt is perfectly secure owing to complainant's guaranty. In such case the guarantor cannot compel the creditor to exhaust the security of the principal debtor before calling on

him for the debt.....The principal debtor being insolvent may decline to incur any expense in litigation, for the reason that it has nothing to lose. Upon what principle of equity then should the guarantor, the only party who is liable to be the loser, be denied relief by a court of equity? How are its rights to be protected, if the doors of a court of equity are closed to it?"

Citing—Mitford Eq. Pl. 148: Story Equity Jurisprudence Sec. 825.

City of New Orleans v. Christmas 131 U. S. 191 at pps. 212.

The Virginia doctrine is: a surety is entitled, the debt being due to come into equity by a bill *quia timet*, against the creditor and the debtor, to compel the latter to make payment of the debt so as to exonerate the surety from his responsibility. He may enforce for his exoneration any liens of the creditor on the estate of the principal; and if the latter be dead, he may bring any suit in equity which the creditor could bring for a settlement of the administration and for the administration of the assets legally equitable. Stephenson v. Tavenner 9 Grat. 404. Neal v. Buffington, 42 W. Va. 326.

The right of the surety to protect himself by bill *quia timet* and compel a debtor to make payment finds support in Story's Equity Jurisprudence Secs. 327, 639, 849.

"In Union Trust Co. v. Morrison, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004, a railroad company obtained an injunction restraining the enforcement of a judgment against it, by which all its property would have been swept away. Judgment was obtained against

the surety on its injunction bond after proceedings had begun to foreclose a mortgage on all the railroad's property, which mortgage was in default at the time of the injunction bond was executed. It was held that without paying the judgment against him, the surety might intervene in the foreclosure suit and might show the fact of payment of the judgment by a supplemental petition; in this case the surety's claim to reimbursement was held to take precedence of the mortgage on the ground that his becoming such surety had saved the railroad from disintegration and saved its property for the benefit of its mortgages."

The rule of exoneration is given in 4th Pomeroy Equity Jurisprudence, sec. 1417, Note: "After the obligation becomes payable, the surety, before he has paid it, and whether he has been sued by the creditor or not, may maintain a suit in equity against the debtor—in the nature of a bill quia timet—to compel him to pay the debt or perform the obligation; provided the creditor can himself enforce payment or performance, and neglects or refuses to do so. Dering v. Earl of Winchelsea, 1 Cox, 318; Leading Cas. Eq., 4th Am. Ed., 120, 124, 134, notes in 2 Lead. Cas. Eq., 4th Am. ed., 278, 280, 283, 306, 1896; Nisbet v. Smith, 2 Brown Ch. 579, 582; Comes Ranelaugh v. Hayes, 1 Vern. 189; Antrobus v. Davidson, 3 Mer. 569; Padwick v. Stanley, 9 Hare, 627; Wooldridge v. Norris, L. R. 9 Eq. 410; Beaver v. Beaver, 23 Pa. St. 167; Ardesco Oil Co. v. N. A. Oil, etc., Co., 66 Pa. St. 375, 381; Bishop v. Day, 13 Vt. 81; 37 Am. Dec. 582; Hayes v. Ward, 4 Johns. Ch. 123, 131; 8 Am. Dec. 554; King v. Baldwin, 2 Johns. Ch. 554; 17 Johns. 384; Norton v. Reid, 11 S. C. 593; White v. Schurer, 4 Baxt. 23; Gilliam v. Esselman, 5 Sneed, 86; Irick v. Black, 17 N. J. Eq.

189; Stephenson v. Taverners, 9 Gratt. 389; Rice v. Downing, 12 B. Mon. 44; Dempsey v. Bush, 18 Ohio St. 376; Fame Ins. Co.'s Appeal, 83 Pa. St. 396, 405."

The same rule is stated in 6th Pomeroy Equity, sec. 919.

Mr. Bray has filed a written proposition to surrender all his profits on these claims, if these profits are applied on the claims of common creditors (held mainly by Eichel.) Record, p. 176.

This fatal admission shows, that the many suits in Pennsylvania cannot be allowed to proceed, because such an adjustment cannot be made in any one of many actions at law, and the proper place to get a settlement is in one single suit in equity.

Fosters Prac. Sec. 2.

The present Act allows but one suit for all claims on the contractor's bond, and we may look to that Act of 1905, as expressing the purpose of Congress, even though our bonds were given under the Act of 1894.

U. S. vs. American Co., 200 U. S. 199.

U. S. F. & G. Co. v. U. S. 204 U. S. 349.

By the Act of 1905 (33 Stats. 811): "Only one action shall be brought * * * The surety may pay into court the full amount of his liability."

Certainly none of these Banks can complain of that injunction. They are not enjoined, and it is certainly to their interest that this fund be applied to their relief.

Nor can Bray complain of being required to take this money on his claims.

Before the Circuit Court, every party having an interest in this matter, was made defendant.

No other court can so conveniently determine the rights of all the parties, as the Circuit Court in West Virginia.

Bray and Eichel have agreed to guaranty Banks against liability as indemnitors. This accounts for the apparent opposition of the Banks to interfering with the Bray-Eichel schemes.

UPON MULTIPLICITY OF SUITS.

Injunction by the United States will not lie against multiplicity of suits, where there is no equity, outside of the fact that numerous parties have cut timber for government under licenses from United States. A mere charge of fraud does not give equity jurisdiction if the facts alleged do not justify the conclusion of fund.

U. S. v. Bitter Root Co. 200 U. S. 457.

But where the defendants wrongfully and unlawfully injure another and interfere with his business, by multiplied acts, and threaten to so continue, "the multiplicity of suits necessarily to be engendered if redress is sought at law, all establish the inadequacy of a legal remedy, and the necessity for the intervention of equity."

Bitterman v. L. & N. R. R. 207 U. S. 204, at p. 225-6.

Hale v. Allison, 188 U. S. 56 decides "that equity is without jurisdiction, on the ground of multiplicity of suits, of a suit, to enforce the statutory liabilities of a

foreign corporation, in which the amount demanded, is the *full amount* of the par value held by each defendant."

(This is on the ground that there is no reason for a convening of parties or of any apportionment and there is a separate claim against each stockholder independent of all others, for a definite amount.)

At page 71 (188 U. S.) the court goes into the question of multiplicity as a ground of equity, *per se*—citing (p. 72) Pomeroy's Equity Jurisprudence, sec. 243 and following.

At page 77, Justice Peckham writes: "Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle, is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon *its own merits, and upon a survey of the real and substantial convenience of all parties*, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied—these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground; and whether within reasonable and fair grounds, the suit is calculated to be, in truth, one which will practically prevent a multiplicity of litigation, *and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interest of any.*"

But where an assessment must be made proportionately, only equity can make the adjustment.

11 Encyclopedia of U. S. Supreme Court Reports, p. 244 and notes—Title, "Stock and Stockholders."

Mills v. Scott, 99 U. S. 25.

Patterson v. Lynde, 106 U. S. 519.

Terry v. Tubman, 92 U. S. 156.

Flash v. Conn., 109 U. S. 371.

In Bitterman v. Louisville & N. R. R. Co. 207 U. S. 205, Mr. Justice White at page 226 states the law: "the proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the circuit court of appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defense which *might be interposed were common to each defendant and involved like legal questions.* Under these conditions the case is brought within the principle laid down in Hale v. Allinson, 188 U. S. 56, 77, 47 L' ed. 380 392, 23 Sup. Ct. Rep. 244."

In Ex-Parte Young, 209 U. S. 123, it is among other things held, at page 164-5, "that the investigation of complicated facts requiring a long and difficult examination, would of itself render necessary a resort to equity because the remedy at law is not adequate."

The trend of that case is to enlarge the jurisdiction of the Circuit Court, to control by injunction persons or

parties who are proceeding in state courts; and this, even with regard to the enforcement of criminal suits of a state. It is true that the jurisdiction of the Circuit Court to enjoin criminal proceedings in a State court, is affirmed, as to a federal court in which is "first *raised the question*" of the validity of the state law; but that was all that is necessary to be decided in that case.

The whole reason and force of that decision lead to the conclusion, that where proceedings are taken by criminal prosecution to confiscate and to destroy property, without compensation or due process of law, if a federal court is invoked for protection of rights guaranteed by the federal constitution—a circuit court must prevent a multiplicity of suits and the destructive oppression, by enjoining all suits then pending, at least until the matters can be determined.

Ex-Parte Young 209 U. S. pages 162-3-6; 166-9.

Smyth v. Ames 169 U. S. 466.

Davis Co. v. Los Angeles, 189 U. S. 207.

Dobbins v. Los Angeles, 195 U. S. 223.

Mr. Pomeroy in his Equity Jurisprudence, commencing sec. 243, treats the subject of "Multiplicity of Suits" at great length.

"The prevention of a multiplicity of suits, produces a material effect upon both the concurrent and the exclusive jurisdiction. It is sometimes one of the very foundations of the concurrent jurisdiction—an efficient cause of its existence. * * * On the other hand, the prevention of a multiplicity of suits is the occasion for the exercise of the exclusive jurisdiction."

In sec. 245(Pom. Eq. Jur.) the author gives four classes or conditions where multiplicity of suits occurs:

1. Cases of nuisance, etc., where the same injured party is to bring a number of actions against the same wrong doer.

2. Where there is dispute between A. and B., and B. institutes a number of actions against A.—"all depending upon the *same legal* questions and *similar issues of fact*, and A. by a single equitable suit, seeks to bring them all within the scope and effect of one judicial determination."

3. "Where a number of persons have separate and individual claims and rights of action against the same party, A.: but all arise from some common cause, and are governed with the same general rule and involve similar facts, and the whole matter might be settled in a single suit."

4. "Where the same party, A., has, or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, while instead thereof he might procure the whole to be determined in one suit brought by himself against all adverse claimants as co-defendants."

We may pass the question raised by the author, sec. 249—"How far is the prevention of multiplicity of suits an *independent* source of equitable jurisdiction?" because that is not necessary to our case.

Equity will enjoin actions at law where equity has exclusive jurisdiction by reason of equitable rights or equitable remedies. Pomeroy, sec. 219. Where the jurisdiction in equity is not exclusive, Equity will enjoin

actions at law, where legal remedies are not adequate. Pomeroy, sec. 243.

This complainant was confronted by a multiplicity of litigation in several directions, and under every class above specified except the first.

Some thirty suits had been brought, every one of which depended on the liability of the Guaranty Co. under a bond involving the construction of an Act Congress; Bray and Eichel stood in fiduciary relation, and the Guaranty Co. had just discovered that they had purchased at a discount, these numerous claims which had been gathered into one hand under the pretended name of Laura Eichel;—a question and equity that attached to each claim, while the complainant had a common question of liability against each one of these seven banks on the contract of indemnity of April 11, 1904.

In whatever direction the complainant turned, the same questions of law, and substantially similar questions of fact, occurred as to numerous claims or groups of claims, to be asserted or defended by the complainant.

THE GUARANTY COMPANY HAD EQUITIES, WHOLLY DISTINCT FROM, AND INDEPENDENT OF MULTIPLICITY OF SUITS.

There was jurisdiction of the court as a Federal Court, both by reason of the Federal questions involved, and of the diversity of citizenship, which, when coupled with the location of the res, gave Federal jurisdiction within the Northern District of West Virginia.

There was Equity jurisdiction on several familiar grounds—the enforcement of an equitable lien; (Pomeroy, secs. 165-7.); the trust relations of parties defrauding the surety, (Ib. secs. 151; 155.) the fiduciary relations, (Secs. 157-158); The subrogation and exoneration of the surety and the right to adjust with all these parties, in one proceeding, and to make an assessment on these several indemnitor banks, after ascertaining the amount due on the claims purchased by Bray after purging them of profits, forbidden to a Trustee.

Ingersoll v. Coram 211. U. S. 335, 368, reaffirms Walker vs. Brown, 165 U. S. 654, thus: "Every express agreement in writing, whereby the contracting party, sufficiently indicates an intention to make some particular property real or personal or fund therein described, or identified, a security for a debt or other obligation, creates an *equitable* lien on the property so designated.

In Foster's Federal Practice, Sec. 2, page 4, 4th Edition, equity has jurisdiction of an "adjustment of liabilities"—under which term are included contribution, exoneration, marshalling of securities," citing many decisions.

There were also grounds of equitable estoppel against Bray and Eichel, who now controlled and owned these claims, because the bill alleged that Eichel had agreed to control those claims, and to prevent any liability against the Guaranty Co., if it would allow the trustees to complete the contracts.

Some of the claims of Bray were fictitous; the use of the name of Mrs. Eichel was fraudulent; Bray and Eichel were seeking to take unconscionable advantage of

the Guaranty Co. by diverting the lien fund to claims of common creditors held by Eichel, and to make the Guarantee Co. pay in full these swollen amounts that were being oppressively urged by suit; and Bray and Eichel had acquired the claims of the Parkersburg Banks, amounting to $45,000.00, and they had agreed to indemnify the five Indiana Banks against all liability to the surety.

It will be observed that the federal question was appropriate to the Federal Court, and the suit was brought in the *only district where there was jurisdiction to control the fund by a decree in rem.*

Wholly independent of the Pittsburg suits and apart from multiplicity there was jurisdiction of the subject matter in equity, as to each party named as defendant.

1. The Second National Bank of Parkersburg and the Farmers & Mechanics National Bank of Parkersburg, were personally subject to the jurisdiction. They were proper parties under the act of 1875 as being in immediate possession of the fund, and they were directly interested in the claim for contribution under the contract they signed, in the stringent terms "to indemnify and save harmless the Guaranty Co. from all loss, charge, damage and liability heretofore accrued or hereafter accruing, against it by reason of its suretyship or liability on said bonds, and on each of them." (p. 28.)

2. Bray, Trustee, was a proper party as trustee of the bankrupt estate, to which the fund belonged, and also in his own right. (p. 191—Bray is made defendant in his own right as well as by description of Trustee.)

Bray and Jacob Eichel are charged with fraud and conspiracy with regard to this fund and these claims. The wife's name was used as pretended assignee. On the face of their pretentions, the legal title was in Mrs. Eichel; and Bray held the note of both Mr. and Mrs. Eichel for $27,000.00 secured on an assignment of these claims. (Record pp. 106-7.)

Moreover, the five Indiana Banks were on that same indemnity guaranty (p. 28), and each of the banks as an indemnitor, was joined not only for the purpose of enforcing that indemnity agreement against them, but also because they were entitled to be brought in to defend or maintain their rights as to this lien fund, and its proper application.

There were two other claimants—the Nicolette Lumber Co. and the Riter-Conley Co.—each of whom held a claim for material and had recourse against the Guaranty Co., if their claims were just. No suit had yet been brought on their claims, but each of them was interested in the application of that lien fund, and in the determination of the amount of the Guaranty Co. on account of its bonds; and all of these questions went back to the common source of the bonds that had been executed by the Guaranty Co. The banks were as much interested in these claims on which suit had not been brought, as they were interested in the claims that had been put in suit in the name of Laura Eichel.

Interposing anothers name deepens the fraud.

As observed in Canton Co. v. Rolling Mill Co. 93 C. C. A. 632: "In Michoud v Girod, 4 How. 503, 11 L. Ed.

1076, two executors combined to purchase, and through an agent employed by them, did purchase, the property of the testator. The sale was held fraudulent and void, under the civil law, the common law, and the general jurisprudence of the nation. The court dwells at pages 559, 560, of 4 How. (11 L. Ed. 1076), on the device of using another's name for the accomplishment of the sale, showing (page 560 of 4 How. 11 L. Ed. 1076) that it was known and denounced, before our language was spoken, as a purchase 'fraudulent and void, from having been *made per interpositam personam.*' Where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so likewise, unless he has innocently acquired a subsequent interest; for a third person by seeking to derive any benefit from such a transaction, or to retain any benefit resulting, becomes particeps criminis, however innocent of the fraud in the beginning. Perry on trusts, sec. 172."

Thus we submit that the Circuit Court had full and complete jurisdiction under a bill in equity under sec. 8 of the Act of 1875; and all this, without reference to a multiplicity of suits, and wholly independent of that ground of jurisdiction.

Injunction of Suits, as Incidental to Exercise of Jurisdiction.

The complainant having a case that was in the exclusive jurisdiction of equity, by reason of its subject matter *quoad* the enforcement of the lien, execution, subrogation, contribution, assessment, reduction of excessive claims by trustee, etc.; and equity also having jurisdic-

tion by reason of its ability to give a remedy "full, adequate and complete," where a court at law could at most only ascertain the amount due on each one of these claims against the surety,—the jurisdiction in equity was, in itself, a ground for enjoining suits at law that involved the same questions or any part of them.

Pomeroy, at sec. 219, uses this language: "The exclusive jurisdiction consists of two district branches, namely, (1) where the primary rights, interests or estates of the complainant parties are wholly equitable, and, (2) where the primary rights, interests or estates are legal, but the remedies sought to be obtained, are wholly equitable."

Further on in the same section, the author writes: "A well-settled doctrine concerning the interference with actions at law by injunction, furnishes a further illustration. If the defendant in an action at law has an equitable interest or estate in the property, or an equitable right in the subject matter, which, according to the established rules of equity jurisprudence, should prevent a recovery against him, but which, being purely equitable, cannot be set up as a defense in a proceeding before a court of law, he can invoke the exclusive jurisdiction of a court of Equity, *without regard to any legal defenses which he may have*, and can procure the action at law to be restrained, and has an equitable interest to be established and enforced by means of appropriate, equitable reliefs, because such equitable interest is not recognized by law, nor cognizable by the legal tribunal. Such illustrations might be indefinitely multiplied." (Sec. 219.)

In Bailey v. Tillinghast, 40 C. C. A. 93, 6th Circuit, (Judges Lurton, Severn and Thompson,)—the point was that, "the Receiver of an insolvent National Bank may maintain a suit in *equity* to enforce an assessment against stockholders, where such assessment *is less than the full amount* of their liability; and.....where the question of law involved is common to a number of stockholders, and rests upon substantially the same facts, they may be joined as defendants. It is not essential that there should be a community of interest between them; *but where a common question of law* arising upon similar facts, is involved between the plaintiff and each defendant, equity has jurisdiction on the ground of preventing a multiplicity of suits."

If the Guaranty Co. should proceed against one of these banks by itself, in an action at law, before the amount of the several liabilities are fixed—what judgment could the court give?

Not for a percentage of $75,000, because that sum is the penalty; not for the penalty less undertermined credits, for that is impossible, until the primary fund is applied.

On a contract of contribution to a comanon fund (e. g. stockholder), the remedy is in equity, "where the rights of the corporation, the stockholder and all creditors can be adjusted in one suit."

Patterson v. Lynde, 106 U. S. 520.

"The proper proceeding is in equity where all the claims can be presented, all the liabilities ascertained and a just distribution made."

Terry v. Tubman, 92 U. S. 156, 161.

11 Encyclo. of U. S. Sup. Court Rep. p. 244.

Flask v. Conn. 109 U. S. 371.

Mills v. Scott 99 U. S. 25.

Carolina Chemical Co. vs. Home Ins. Co. 113 F-1—also 51 C. C. A. 21 (Fourth Circuit.)

Under the decision of Babbitt v. Dutcher, 216 U. S. 102—a Federal District Court has jurisdiction to entertain procedings instituted by a trustee in bankruptcy, duly appointed in a bankruptcy proceeding in another district, the court thus appealed to, exercising an ancillary jurisdiction. The opinion says, (p. 112) that section 23a of the Bankrupt Act did not restrict the general jurisdiction conferred in bankruptcy, (p. 113.)

It is certainly not venturing too far to say that when the District Court of West Virginia decreed that this bill should be treated as an ancillary bill, and when the Circuit Court granted this order intending it to be ancillary, there is no posisble rule of comity or of interference with other courts, that could in any way militate against the proceeding.

But we will be told that section 720 of the Revised Statutes forbids an injunction against a State Court except in cases of bankruptcy.

In the first place, this is a "matter in bankruptcy," but further than that, the parties enjoined had submitted themselves to the federal jurisdiction in West Virginia before resorting to Pennsylvania.

We must bear in mind that the injunction did not

stay anything except the suits on the same claims that were liens upon the fund, if they were just claims against the Guaranty Co., and the parties enjoined were Bray and Mr. and Mrs. Eichel.

Bray and Eichel had agreed to indemnify the Indiana Banks against their indemnity and they were the holders and the owners of the original debts of the Parkersburg Banks.

These complications did not detract from the numerous equities already existing, but rather added to the right of the Guaranty Co. to have these matters simplified; nor could any of these banks, in any just sense, complain of means taken to prevent an excessive recovery of amounts against which the Banks had agreed to indemnify the complainant.

1 Bates Federal Equity Procedure, Sec. 545 correctly lays down the doctrine: "In a proper case, the equity courts of one state can restrain persons within their jurisdiction from the prosecution of suits in another state. The exercise of such power is in accordance with well settled principles of equity jurisprudence and practice, both in England and America, and the federal constitution does not prescribe a different rule. The determination of what is a proper case for equity interposition is reposed in the court whose authority is invoked. In such cases, the court having jurisdiction of the parties acts *in personam*." The author cities abundant authority.

Cole v. Cunningham, 133 U. S. 107-116.

It is no objection to the issuing of such an injunction, that the parties enjoined did not reside in the

district, or that the court did not have jurisdiction in personam at the time of the commencement of the suit.

The plaintiff had a right to state his entire case, and to point out the appropriate relief so that the court could give relief in personam; and such is the provision of the Act of 1875 which provides that the court may *make a decree personally binding upon any defendant who appears within the jurisdiction.*

THE DEFENDANTS WERE BEFORE THE COURT, WHEN THE INJUNCTION WAS GRANTED.

As a matter of fact, after demurring, "the defendants Laura Eichel, Jacob Eichel and the Indiana Banks filed the affidavits of Jacob Eichel, of Laura Eichel, of P. W. Frey and M. J. Bray *in opposition to plaintiffs motion for injunction*.....and the matters aforesaid were argued by counsel for the respective parties and meantime until the court shall determine the question of granting an injunction, the restraining order heretofore awarded shall continue in force," (Rec. pages 85-86.) Each of these demurrers went partly to the merits of the bill, Jacob and Laura Eichel assigning as follows:

"2nd. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

3rd. The matters in litigation as shown by the bill are involved in other suits, in other United States Courts and other state courts brought before the filing of the bill. (Rec. pages 74-75.)"

Bray's demurrer assigns as ground," that the bill does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court;" and, second, prior suits in other courts, as in the case of the demurrers of Mr. and Mrs. Eichel. (p. 82.)

The defendants insist that Mrs. Eichel is the real plaintiff in those actions and controls them. If that be true, the injunction would affect her only, but these affidavits go to the merits, and are substantial answers to the bill, and were intended not only to raise a question of the merits on the demurrer, but also to answer the charges contained in the bill.

See answer of Bray (p. 151.) He states (p. 152) that he has been served with copy of *the bill in chancery*..... and he undertakes to answer the charges preferred against him in that bill. (p. 152.) The affidavit of Jacob Eichel appears at page 137, and the affidavit of Laura Eichel appears at page 142, while the affidavit of Mr. Frey appears at page 149. These affidavits are in substance, and in fact, filed for the purpose of responding to the bill, and they only lack the word to "answer" to make them technical *answers*.

The defendants had the advantage of those affidavits, whereby they submitted themeselves to the jurisdiction of the court on the merits of the controversy.

Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S. 368.

Followed by Bluefield Co. v. Steele, 184 Fed. 584; 106 C. C. A. 564, holding—

"Where diversity of citizenship exists, so that the suit is cognizable in some Circuit Court, the objection to the jurisdiction of the particular court in which the suit is brought, may be waived by appearing and pleading merits (In re Moore, 209 U. S. 490,—overruling anything to the contrary in Ex parte Wisner, 203 U. S. 449)."

"The interposition of a demurrer going to the merits as well as to the jurisdiction, amounts to a waiver of the objection that the particular Circuit Court in which he is sued, is without jurisdiction."

West L. Co. v. Butte Co. Supra.

In that case the grounds of the demurrer were—

1. That the court has no jurisdiction of the subject of the action.

2. That the court has no jurisdiction of the person of the defendant.

3. That the complaint *does not state facts sufficient* to constitute a cause of action.

4. That the complaint is uncertain.

5. That the complaint is unintelligible.

(210 U. S. 370.)

In Bluefield v. Steele, 106 C. C. A., at page 566, the court says—"one of the five objections embodied in the written motion to vacate, is, that the suit was brought in the wrong district; but the other objections go to the substance and merits of the bill. Having invoked the judgment of the court on *the merits of the case*, the appellant cannot now properly object that the court has no jurisdiction of its person."

In St. Louis R. R. Co. v. McBride, 141 U. S. 127, the demurrer was:

1. Because the court had no jurisdiction of the person of the defendant.

2. The court had no jurisdiction of the subject matter of the action.

3. The complaint does not state facts sufficient to constitute a cause of action.

Mr. Justice Brewer delivering the opinion said:

"The demurrer was based on three grounds; two referring to the question of jurisdiction, and the third that the complaint did not state facts sufficient. There was, therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waived not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

The appearance and defense on the actual merits regarding questions of fact as shown in these affidavits, clearly subjected the parties personally to the jurisdiction and they had the benefit of the consideration by the court of every objection that could be urged to the sufficiency of the bill, and to the truth of the facts stated, and the equities involved.

Moreover, these defendants could not object to being sued in this West Virginia district, because the action was local—where the fund was, and the suit was directly authorized by statute as to all of these defendants.

Under the Act of 1875, they had the right to submit themselves to the jurisdiction personally, or to let the court proceed strictly *in rem*.

They clearly elected to make the contest on the merits, and particularly with reference to the granting of this injunction.

Having had the benefit of the argument as well as their version of the facts, that question was heard on the merits.

The jurisdiction of the Circuit Court was riveted and fixed, whether these defendants should come in or not.

It is true that a pure bill of injunction brought for the sole purpose of protecting forests in Georgia from the effect of fumes and gases generated in Tennessee, will not lie in Tennessee by a West Virginia owner of Georgia lands against a New Jersey owner of Tennessee property; but that is because a nuisance committed on lands in Tennessee and affecting lands in Georgia, does not constitute "a lien upon or a claim to" the Tennessee land, the only relief asked being in personam.

Ladew v. Tenn. Copper Co., 216 U. S. 357.

Wetmoore v. Same, 216 U. S. 369.

In cases where the Federal Court exercises an ancillary jurisdiction, the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding sec. 720 of the Revised Statutes, restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction.

Julian v. Central Trust Co., 193 U. S. 93, page 112.

French v. Hay, 22 Wall 250.

Dietzsch v. Huidekoper, 103 U. S. 494.

The pendency of a suit in a state court does not deprive a federal court of jurisdiction. The Circuit Court may enjoin, at the suit of the Cotton Exchange, the receipt and use by the defendant of quotations of sales on such exchange, notwithstanding Sec. 720 of the Revised Statutes, as enjoining proceedings in a state court, because an injunction has been granted by a state court in a pending suit between the defendant and the Telegraph Co. restraining the Telegraph Co. from refusing him such quotations.

Hunt v. N. Y. Cotton Exchange, 205 U. S. 322-338.

In the same case, it is held that the pendency of a suit in in the state court does not deprive a federal court of jurisdiction, citing—Gordon v. Gilfoil, 99 U. S. 168.

In Insurance Co. v. Brune, 96 U. S. 588, the plea of a former suit in equity for the same cause, in a foreign jurisdiction, will not abate an action at law in a domestic tribunal, or authorize an injunction against prosecuting such action; but that case did not have the element of *multiplicity of suits.*

In Marshall v. Holmes, 141 U. S. 589, a number of judgments at law had been obtained in a state court aggregating over $3000. After the close of the term, the defendant filed a petition to set aside the judgments as having been fraudulently obtained, and subsequently, he removed the cause into the Circuit Court of the United States, held; that as all the judgments at law were held in the same right and against the same parties and as their validity depended upon the same facts, the de-

fendant in order to avoid a multiplicity of suits . . . was entitled to bring one suit for a final decree determining the matter in dispute that was common to all the parties. A Circuit Court of the United States in the exercise of its equity powers and where diverse citizenship gives jurisdiction over the parties may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a federal court, if the judgment had been rendered by it and not by a state court, because a decree to that effect does not operate upon the state court but upon the party.

In Ex-Parte Simon, 208 U. S. 144, in a case where Simon sought to be discharged upon habeas corpus from contempt of an injunction, on the ground that the Circuit Court had no jurisdiction; and where the court below had overruled the demurrer to the bill—Mr. Justice Holmes writes:—This is not a suit coram non judice and wholly void under Sec. 720 of the Revised Statutes. The Circuit Court had jurisdiction of the cause. That must be assumed *at this stage*, and finally, unless we overrule the strong intimations in Marshall v. Holmes, 141 U. S. 589 . . . it would be going far to say that although the Circuit Court had power to grant relief by final decree, it had not power to preserve the right of the parties until the final decree should be reached.

"It is now so thoroughly settled that Sec. 720 of the Revised Statutes does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceed-

ings in a state court, that the proposition needs no discussion."

Gregory v. Pike 67 Fed. 835-836, by Putnam Judge.

Foster's Practice (4th Ed.) Sec. 211b, page 697.

It is now settled that a Circuit Court of the United States can in a proper case enjoin the prosecution of a suit in any other court of the United States.

Foster's Practice, 4th Ed., page 693, Sec. 211a.

Thus a manufacturer who has obtained a decree in his favor, which has been affirmed by the Circuit Court of Appeals in one Circuit can enjoin a complainant who has been defeated from bringing similar suits in any Circuit of the United States; even in a case where the Circuit Court of Appeals has held otherwise under similar facts, and further that a suit previously brought may be thus enjoined.

Kessler v. Elfred, 206 U. S. 285.

The decree in the case at bar only allowed a temporary injunction, at a preliminary stage of the cause, to operate "until further order", in a case where the jurisdiction was clear and where, by demurrer, every fact was admitted as charged.

We, therefore, submit that:

1. There was jurisdiction in the Circuit Court as a Federal Court, by reason of the subject matter—there being involved a federal question, in a case of diverse citizenship, to enforce a lien upon, and a claim to, $26,000, within the District.

2. Equity had jurisdiction to enforce the lien and claim, and to compel an accounting and to apportion the liability, and prevent fraud by a Trustee.

3. The Circuit Court having jurisdiction in Equity, by reason of the equitable character of the subject matter, it had power to enjoin a multiplicity of suits brought by Bray and others, whether or not that mere multiplicity gave equity per se.

4. The Court had the right to stay those suits at least temporarily, whatever might be deemed proper, on final hearing.

V.

It was error to sustain the Demurrers, to dissolve the Injunction and to dismiss the Bill.

The final order of the Court of Appeals (Record, p. 219) is: "That the decree of the Circuit Court be and the same is hereby reversed with costs, and the cause is remanded * * * with directions to dissolve the Injunction granted, and dismiss complainant's Bill, without prejudice, and in accordance with the opinion of this Court."

The opinion concludes, after holding that the District Court in Bankruptcy has exclusive jurisdiction of all matters affecting this fund (p. 219).

"Our opinion being that the Circuit Court was without jurisdiction, the demurrers to the Bill should have been sustained. The refusal to do this, was error, and it was also error, to grant the injunction. The decree of the Circuit Court is therefore reversed, and the case will be remanded, to the end that the injunction granted, may be dissolved and complainant's bill dismissed."

Although this dismissal is "without prejudice", it would be embarrassing hereafter to proceed in any jurisdiction, to ascertain the debts and to enforce the lien against the fund, and to apportion amounts against these several banks.

The Bankruptcy Court could grant no such relief, because it has no such jurisdiction; but if it has exclusive jurisdiction to make an adjustment regarding the fund, there is no other court where all these matters can be adjusted. The Court of Appeals, has denied all judicial power, State or Federal, *outside the District Court.*

The District Court has no jurisdiction under Sec. 8 of the Act of 1875.

Waukesha Co., 116 F. 1011.

Shainwald v. Lewis, 5 F. 517.

While the cause went to the Circuit Court of Appeals, by reason of the granting of the Injunction, that court had power to pass upon all questions then presented.

Smith v. Vulcan Works, 165 U. S. 518.

Re Tampa St. Railroad Co., 168 U. S. 583.

And the Appellate Court can dismiss a Bill at that stage, if the Court below could properly have done so. That is, where the case was so lacking in jurisdiction or in merit, that the Bill could not be amended, it is not necessary to retain the case and needlessly protract the litigation, by a formal leave to amend; but that only applies when it is apparent that in no view can the suit be retained.

Mast vs. Stover Co., 177 U. S. 495.

Castner v. Coffman, 178 U. S. 183.

Harriman vs. North Sec. Co., 197 U. S. 245.

Highland Avenue Co. v. Columbian Co., 168 U. S. 627.

All of the Indiana Banks, and Mr. and Mrs. Eichel demur in same language—1. That defendant is of Indiana, and not within the jurisdiction of the Court; (2) The Bill discloses no lien; (3) the matters in litigation are involved in other Federal and State Courts. (Record pp. 70-79.)

Bray demurs on the grounds:

(1.) *Not because of his being a resident of some other District*, but because "The Bill discloses no lien upon any property within the District; (2) other suits are pending, as shown by the Bill. (Record p. 82.)

The Farmers & Mechanics Nat. Bank, and the Second National Bank of Parkersburg, file identical demurrers. (Rec. pp. 80, 83.)

1. The plaintiff states no case for relief against this defendant.

2. The plaintiff states no case for relief.

3. The Court had no jurisdiction.

4. The remedy is at law.

5. The indemnity agreement of the banks is ultra vires.

6. The Bill is multifarious, being for distinct matters and causes, "in several of which the defendant is not in any manner concerned."

These Parkersburg Banks, holding the fund, were, also, general creditors, and they were indemnitors of the surety. They were citizens and residents of the District; and interested in every phrase of the litigation; and as persons in possession of the funds, they were proper parties.

As to the Demurrers of all the Indiana defendants, we have fully discussed the grounds of their demurrers, and we have indicated that by appearing and filing affidavits upon the question of Injunction, they submitted personally to the jurisdiction. (Record, pp. 85-6.)

Mr. Bray's demurrer does not set up that he is exempt from suit in the District (p. 82). He probably thought that it was unbecoming to deny personal jurisdiction, in the District where he was appointed. He appeared generally—

Coram vs. Ingersoll, 211 U. S. 335.

He relied only on the ground, that there was no lien upon any fund within the District.

The local Banks could not escape the jurisdiction, where they were locally residents and citizens; but they insist that funds deposited in their vaults are not in the District; and they demur to the merits of the Bill.

Passing the point, whether parties who are not enjoined, can on such an appeal demand judgment in an Appellate Court, upon the merits of the controversy, we take the questions of ultra vires and multifariousness, raised by these domestic Banks.

A party who is not enjoined, cannot take an appeal from an interlocutory injunction.

Ex parte Nat. Enameling Co., 201 U. S. 156, 161.

Stearns-Roger Co. v. Brown (C. C. A.), 114 Fed. 939.

Ultra Vires.

The two Parkersburg Banks, at pages 80 and 83, pleaded in identical terms by way of demurrer, that under the laws of the United States, "This defendant had no authority, right or power to execute any such alleged bond or indemnity, and the same if executed is null and void and wholly incapable of enforcement against this defendant."

Section 55c of the Bankruptcy Act provides—

"The creditors shall at each meeting take such steps as may be pertinent or necessary for the promotion of the best interests of the estate and the enforcement of this act."

Section 2 (5) empowers the Courts in Bankruptcy to "authorize the business of bankrupts to be conducted in limited periods by the Receivers, the Marshals or Trustees, if necessary in the best interests of the estate."

On April 11, 1904, record page 23, the following order was made in bankruptcy:—

"This cause having been heard, considered and submitted for a decision and decree thereon mentioned in the petition filed by the Trustees herein on the 17th day of March, 1904, *at a meeting of the creditors* called for the purpose of passing upon said petition, of which meeting ten days' notice was given to all of the creditors of said bankrupt, informing them that said petition would

be heard and considered * * * on the 29th day of March, 1904. * * * * And it appearing to the Court * * * that it being to the best interest of the creditors of the said bankrupt; that the business of said bankrupt be conducted for a limited period by the said trustees—M. J. Bray, etc.; and that it is absolutely impossible to conduct such business and to complete the contracts mentioned in said petition, and to release said contracts without borrowing money by the said Trustees * * * and that it would be necessary to raise a sum for the purposes aforesaid not to exceed seventy-five thousand dollars * * * and that no adverse interest appearing in said meeting in opposition to the prayers of the petition, it is ordered, adjudged and decreed * * * that seventy-five thousand dollars, etc., be borrowed on certificates, etc."

That petition of the Trustees which was laid before the creditors, and of which notice had been given, is found on page 167 of the record.

The agreement for indemnity, Exhibit F. with the bill at pages 27 and 28 refers to the meeting that was held authorizing the borrowing of the seventy-five thousand dollars; and these banks guaranteed that inasmuch as the Guaranty Co. was unwilling that the Trustee should conduct the business and issue these certificates unless indemnified; now therefore, the agreement of indemnity is made—that each bank will contribute to a sum not exceeding seventy-five thousand dollars, to indemnify the Guaranty Co. against all liability on its bonds,—the amount to be paid to be apportioned to the several banks in the ratio that the debt of each bank should bear to the total indebtedness.

The Bill charges that each of these two West Vir-

ginia Banks realized a large proportion of their debts, and sold the same, by reason of the fact that this arrangement had been made, "and at a time when such sales were made possible, by reason of the profits expected to accrue from your orator permitting the performance of the Government contracts by the Trustees;" (pp. 15 and 16) —and all the banks got the benefit of the agreement (pp. 16 and 17).

The Bill shows, that the only way of continuing the business, as allowed by the Bankruptcy law, was to get the assent of the Guaranty Co., and it would consent only upon obtaining an indemnity, in the manner shown. (pp. 27-8.)

To save a debt, a National Bank may contract to contribute to a fund necessary for that purpose and limited within the amount of its debt, or it may agree to guarantee or to indemnify to an amount limited by its own debt which it is seeking to save, as in the case of taking stock in other Banks as collateral and becoming subject to assessment thereon.

In this connection we point out exactly what was the contract of these banks, because it has been several times misstated in opposing briefs, (see Record p. 27-29.)

No one bank bound itself for seventy-five thousand dollars.

No one bank bound itself for an amount equal to its own debt; no bank became liable for any other bank, or for any other person than itself. Its utmost liability was for 65 per cent. of its own claim.

Just as any creditor might agree to advance some ready money, in order to save a claim that would otherwise be lost; or as a creditor for his own protection, might give his credit in order to save a debt; each of these banks for itself, agreed that if the Guaranty Co. would forbear to enforce its lien and rights against the funds, and to seize the property and complete these contracts—and if the Guaranty Co. would consent that money might be borrowed as a first lien on the assets up to the amount of seventy-five thousand dollars, then each bank agreed to make good a loss in the proportion that the debt of each bank bore to all of the debts which were listed and stated at one hundred and fifteen thousand dollars. (Record pp. 28-29.)

This agreement was executed by direction of the Board of Directors of each bank, as certified. The effect and meaning of that agreement was, that if the total loss was $75,000.00, each bank would contribute such proportion as its debt bore to the aggregate of $115,000.00. Thus if the final amount of liability against the Guaranty Co. should be $45,000.00, and if this lien fund were applied thereon at $25,000, there would be a balance of—say—$20,000.00, to be distributed among all of these banks. Then the City National Bank of Evansville, holding $5,000, would be required to pay 5-115 or 1-23 of that sum, a little over 4 per cent.

Or, put it in another way,—there could never be a greater liability than an aggregate of $75,000.00, which, prorated on the total of the aggregate basis of $115,000.00, would make as the extreme liability of any bank,

$75,000,00 divided by $115,000.00, or about 65 per cent. of the claim that any bank was seeking to protect.

Once more: Whenever the loss, if any, is ascertained that the Guaranty Co. is required to pay after deducting the primary fund, then each bank shall contribute its share in the proportion that its claim bears to the total of those claims, and it would make the following percentages:

City National Bank, debt $5,000,total $115,-
000.00 ..... 4.3 per cent
First Nat. Bank, debt $24,000, total $115,-
000.00 .....21 per cent
Citizens Nat. Bank, debt $24,000, total
$115,000 .....21 per cent
Farmers & Mechanics Nat. Bank, debt
$20,000, total $115,000.....17 per cent
Second Nat. Bank, debt $25,000, total
$115,000 .....22 per cent
Farmers Bank of Rockport, debt $10,000,
total $115,000 ..... 8.6 per cent
First Nat. Bank of Rockport, debt $7,000,
total $115,000 ..... 6.1 per cent

The exact situation of facts with regard to this indemnity contract, executed by these banks, should be borne in mind, not only with reference to the question of equity jurisdiction, but, also, on the question of the validity of a contract made by a bank for the protection of its debt under an arrangement to have Trustees continue the operations of the bankrupt under section 2(5) of the Bankruptcy Law authorizing that course.

* * * In First Nat. Bank vs. Nat. Exchange Bank, 92 U. S. 122, the Court quotes the Statute at p. 127, and says—"authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on, are granted. These powers are such as are required to meet all legitimate demands of the business, and to enable the bank to conduct its affairs within the general scope of its charter. This necessarily implies the right of a bank to *incur liabilities* in the course of its business, as well as to become a creditor of others * * * *Obligations may be assumed that result unfortunately* * * *. Compromises to avoid or reduce loss, are oftentimes a necessary result * * *. These compromises come within the general scope of the powers permitted to the directors and officers, and are submitted to their judgment and discretion, except to the extent that they are restrained by charter. *Banks may do in this behalf whatever natural persons could do under like circumstances.*"

In that case, it is held, that in adjusting claims, a bank may pay a larger sum than it owes, so as to obtain a transfer of railroad stocks and securities, in the honest belief that by turning them into money at a later date, they would save a loss; and so they might accept stocks for a bad debt, although they are not permitted to deal in stocks.

In Western National Bank v. Armstrong, 152 U. S. 346, it is held that while the Banking Act gives no express power to borrow money, or to give notes, yet a bank may incur liabilities and become a debtor to others, as well as a creditor, and may borrow money.

In Hanover v. First Nat. Bank, 48 C. C. A., 482—a

National Bank may make an oral contract to repay borrowed money.

In Rankin v. Emigh, 218 U. S. 27, a National Bank, to save a debt owed by a Creamery Company, took an assignment of its property and undertook to carry out its contract, to receive the milk of patrons, convert it into butter and turn over the remainder. The court does not decide whether or not that arrangement is ultra vires; but holds that, even if the carrying on of that business is illegal, persons whose money had been thus acquired, were entitled to recover it from the bank.

In Citizens Nat. Bank v. Appleton, 216 U. S. 196, the question of ultra vires was not decided, but it was held that a National Bank which guarantees a loan made by another bank in pursuance of an agreement that it should be paid the amount due it by the borrower out of the proceeds of the loan, cannot avoid its liability for the amount actually received, on the ground of ultra vires; and it was decided that the bank was liable. Citing among other cases, at page 203, March vs. Fulton County, 10 Wall. 684 —"The obligation to do justice rests upon all persons natural and artificial; and if the county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

In Aldrich v. Chemical National Bank, 176 U. S. 618, the Vice-President borrowed money from another bank, and placed the amount in a third bank, to the credit of his bank; and this money was used for the benefit of the bank on whose credit it was borrowed. The borrowing

bank was held liable, notwithstanding the plea of ultra vires.

In Merchants' Nat. Bank v. Wehrman, 202 U. S. 295, it is held that a National Bank may not become the owner, in satisfaction of a debt, of shares represented by transferable certificates in a *partnership* formed to purchase improve, divide into lots, and sell the leasehold, and is not liable in an action against it founded upon its liability for partnership debts.

Mr. Justice Holmes, at page 300, writes—"The question of substantive law presented, is not without difficulty * * * *. It is not disposed of, even by the decisions that it (a bank) may acquire stock in a corporation in this way. First National Bank, 92 U. S. 122, supra." And so subject itself to the liability of a stockholder, for the corporate debts;—a proposition not shaken by Scott v. Deweese, 181 U. S. 202. * * * "

At page 301, having shown that a National Bank may take stock and incur a stockholder's double liability in trying to save a debt, the learned Justice proceeds—"but when a similar transfer is made of a share in a partnership, it means that the transferee at once becomes a member of the firm and goes into its business with *an unlimited personal liability*, in short, does precisely what a National Bank has no authority to do. * * * It has recently been decided that a National Bank cannot take stock in a new speculative corporation with a common double liability in satisfaction of a debt. First National Bank v. Commerce, 200 U. S. 425. A fortiori, it cannot take shares in a partnership to the same end."

In First National Bank v. Converse, 200 U. S. 425, the opinion is by Mr. Justice White,—Mr. Justice Brewer

and Mr. Justice Brown dissenting, and Mr. Justice Harlan concurring upon the authority of an earlier decision.

(California Bank v. Kennedy, 167 U. S. 362.)

It was there held that the defense of ultra vires was good, where the bank, in exchange for a claim against an insolvent corporation subscribed for stock in a company, organized for a purely speculative business of buying and selling stock of an existing insolvent corporation, with power to engage in a manufacturing business, where a double liability was imposed on the stockholders, and where the action is to enforce that statutory liability.

In California Nat. Bank v. Kennedy, 167 U. S. 362, it was held, that stock of a Savings Bank, not taken as security, nor acquired in the course of the business of banking, cannot be purchased or dealt in by National Banks.

The opinion of Mr. Justice White, at page 367, reads —"A National Bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness."

"It is clear, however, that a National Bank does not possess the power to deal in stocks. * * * *It was admitted that the stock of the savings bank was not taken as security or anything of the kind*, and it is not disputed * * * that the transaction by which this stock was placed in the name of the bank, was one not in the course of the business of banking for which it was organized."

We submit that this contract of indemnity, strictly limiting the liability of the bank to the amount that it might be called on to contribute, as a condition of realizing the immense profits which were then believed to be in sight, is clearly within the principle of all the cases that have allowed a recovery against a National Bank as the holder of stocks taken to secure a debt, where the amount of the liability was limited only by the amount of the stock.

Some criticism has been made upon the issuing of the certificates on which money was borrowed. As all money so borrowed was repaid and the certificates were retired no point can be made on that score.

In Eastern Association v. Williamson, 189 U. S. 129, the defense was that a promise of a building association to mature its shares in a specified time was ultra vires, and that defense was interposed against a shareholder who had in good faith performed his part of the contract. The Court quoted with approval the following from a New York decision (189 U. S., p. 129):

"While a contract remains unexecuted upon both sides, a corporation may say in defense, that it had no power to make the contract; yet when it becomes *executed by the other party*, the corporation is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power. Bissel vs. Michigan S. & N. I. R. Cos., 22 N. Y., 258; Whitney Arms Co. vs. Barlow, 63 N. Y., 62; 20 Am. Rep., 504; Rider Life Raft Co. vs. Roach, 97 N. Y., 378; Holmes B. & H. vs. Willard, 125 N. Y., 75, 80; 11 L. R. A., 170; 25 N. E., 1083; Buffalo vs. Balcom, 134 N. Y., 532; 32 N. E., 7; Bath Gaslight Co. vs. Claffy, 151

N. Y., 24; 36 L. R. A., 664; 45 N. E., 390; Moss vs. Cohn, 158 N. Y., 240, 249; 53 N. E., 8 Hannon vs. Siegel-Cooper Co., 167 N. Y., 244; 52 L. R. A., 429; 60 N. E., 597."

In Green Bay Co. vs. Union Steamboat Co.,107., U. S. at page 100, Justice Gray writes: "Whatever under the charter and other general laws reasonably construed, may fairly be regarded as incidental to the object for which the corporation is created, is not prohibited."

While a corporation retains the benefit of such a contract it must not be permitted to deny its validity.

Sioux City R. R. vs. Trust Co., 27 C. C. A., 73.

Bank v. Mathews, 98 U. S., 621.

Bank v. Whitney, 103 U. S., 99.

In considering the question of ultra vires, regard must always be had to the object and the purpose of the contract; for whose benefit it is; with what purpose and intent was it made? "It is ultra vires of the corporation to execute an accommodation paper or to enter into contracts of guaranty or suretyship, *not in furtherance of its business*, unless given express authority to do so. Monographic notes, Re-Assigment Mutual Insurance Co., 70 Am. St. Rep., 164; Altoona Nat. Bank vs. Dunn, 31 Am. St. Rep., 753; City R. R. vs. First Nat. Bank, 54 Am. St. Rep., 282; Best Brew Co. vs. Klassen, (111.), 76 Am. St. Rep., 26.

MULTIFARIOUSNESS.

This ground of Demurrer cannot be taken by a defendant who is a proper party, whatever might be the right of one not so situated to raise that objection.

Story's Eq. Pleading, Sec. 544.

Foster's Practice (4th Ed.) Sec. 75.

Missouri Broom Mfg. Co. v. Guymon, 53 C. C. A. 16.

These local banks are proper parties as having the fund in possession, independent of their pecuniary interest in the application of the fund, and aside from their liability to contribution.

But of what element in this cause can it be said, that these banks "are not in any manner concerned?"

The question of multifariousness is largely one of convenience and discretion; and where the rights of several are interwoven with transactions in which all have interests, the bill cannot be held multifarious, by reason of the complications that must be unraveled, as can be done only in equity.

Bates Equity, sec. 135, 136.

Graves v. Corbin, 132 U. S. 571.

Carolina Chem. Co. v. Home Ins. Co., 51 C. C. A. 21.

Foster's Prac., Sec. 75.

A decision overruling an objection for multifariousness will not be reversed on appeal.

Foster's Prac., Section 75, p. 393.

When objection for multifariousness is sustained, the complainant will always be allowed to amend.

Walker vs. Powers, 104 U. S. 245.

It Was Error to Dissolve the Injunction.

We beg to refer to the preceding argument on the subject of the injunction, and we respectfully insist that it should be reinstated.

Mr. Bray as Trustee had in hand the funds about equal in amount to what he paid for the claims he holds. Bray, under the allegations of the bill, is the real owner of the claims, and the real plaintiff in the enjoined actions, and he is using those proceedings vexatiously and oppressively at the same time that as Trustee he controls the evidence and the sources of information. It can be no hardship on him to require him to litigate these matters in one suit in this jurisdiction, where the records and accounts and books and papers belong, and where he qualified and completed the Government Works under arrangements made with this surety. Mr. Bray was certainly before the Court at the time the injunction was granted, because he filed a demurrer to the merits, and did not controvert his liability to suit within the District. (Record, p. 82.)

Coram v. Ingersoll, 211 U. S. 335.

Mr. and Mrs. Eichel also appeared generally on the question of the Injunction and filed their own affidavits, and also the affidavit of Bray, resisting the injunction. (p. 85.)

Moreover, the affidavits they filed, taken in connec-

tion with the allegations of the bill and the depositions that had been given by Bray and Eichel,—showed that the allegations of the bill were true, and that those actions ought to be enjoined, at least until the court could hear all matters in controversy upon the merits.

The Circuit Court of Appeals dissolved the injunction without passing upon the merits of that question.

It is clear that if that Honorable Court had not yielded to the omnipotence of the District Court and dismissed the bill for want of jurisdiction—it would not have disturbed the order granting the injunction, because an Appellate Court will rarely review the decision of the lower court in granting a temporary interlocutory injunction.

U. S. Gramophone Co. v. Seaman, 113 Fed. 745; 51 C. C. A. 419, Fourth Circuit.

Stearns-Roger Mfg. Co. v. Brown, 52 C. C. A. 559; 114 Fed. 539.

Am. Fur. Ref. Co. v. Cimmiotti Unhairing Co., 118 Fed. 838; 55 C. C. A. 513.

Foster's Practice (4th Ed.) Sec. 238, p. 762.

And this applies with greater force where the case stands upon a demurrer with all facts admitted.

Foster's Prac. Ib.

With entire deference, we submit and pray that the

decree and decision complained of, rendered by the Circuit Court of Appeals, should be reversed, and that the order and decree made by the Circuit Court, overruling the demurrers and granting the preliminary injunction, should be affirmed. (Record, p. 191.)

W. W. VAN WINKLE,
M. G. AMBLER,
B. M. AMBLER,
Counsel.

Parkersburg, W. Va.
November, 1911.

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POINTS. (INDEX INSIDE.)

1. Supreme Court has jurisdiction of controversy involving rights and liabilities on Federal contractor's statutory bond. Henningsen vs. U. S. F. & G. Co. 208 U. S. 404; Hardaway vs. Nat. Surety Co. 211 U. S. 552. *Brief*, 34.

Limitation on this appeal is one year. Allen vs. So. Pac. Co. 173 U. S. 479; Hoit vs. Indiana Co. 176 U. S. 70. *Brief*, 33.

2. Circuit Court has jurisdiction to decree lien upon property within *its* district, as in a local action; Dick vs. Foraker 155 U. S. 410; Citizens Co. vs. Ill. R. R. 205 U. S. 46; Ingersol vs. Coram, 211 U. S. 335. *Brief*, 53.

3. Although the property is a fund under administation of another court. Ingersol vs. Coram, 211 U. S. 335. *Brief*, 57.

4. The bill is within Sec. 23a of Bankrupt Law. Bush vs. Elliott, 202 U. S. 477; Frank vs. Volkommer 205 U. S. 521. *Brief*, 61.

5. The lien exists. Ingersol vs. Coram, 211 U. S. 335, 368; Henningsen vs. Appellant, 208 U. S. 404; Hardaway, supra. *Brief*, p. 45.

FILED.
OCT 5 1909
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CLERK.

NO. [redacted] 111

In The Supreme Court of The United States.

THE UNITED STATES FIDELITY & GUARANTY CO., Appellant

vs.

M. J. BRAY, M. J. BRAY, Trustee, et al., Appellees.

OCTOBER TERM, 1909.

APPEAL FROM THE CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

UPON MOTIONS TO DISMISS, AFFIRM AND ADVANCE.

BRIEF FOR THE APPELLANT:

W. W. VAN WINKLE,
M. G. AMBLER,
B. M. AMBLER,
Counsel for Appellant.

No. 565

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OCTOBER TERM, 1909.

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UPON MOTIONS TO DISMISS, AFFIRM AND ADVANCE.

BRIEF FOR THE APPELLANT:

W. W. Van Winkle,
M. G. Ambler,
B. M. Ambler,
Counsel for Appellant.

STATEMENT.

The motion papers served on Appellant are accompanied by no part of the record below. We are required to examine the transcript sent up from the

Court below, for every essential feature of the record. Appellees' counsel, at page 3 of their printed motion, submit their version of facts, as condensed from an unofficial report of the Court's opinion; and we have uncertified copies from the orders of the Court of Appeals (pp. 13-14), of the Bill of Complaint, without exhibits (15), and one of the several demurrers filed in the court below (47).

No part of the record as such has been printed, and the court cannot act understandingly without reference to the transcript. The motion papers are wholly insufficient, even if we should waive the required authenticity of the meager scraps presented.

Callan v. Bransford, 139 U. S. 198.
Carey v. Houston R. R. Co., 150 U. S. 171, 179.

The scope of the bill and its averments are not fully stated.

The Circuit Court of Appeals has dismissed a bill filed by the United States Fidelity & Guaranty Co. in the Circuit Court, as surety for a bankrupt Contract Co. on four bonds, covering four separate contracts, for the construction of public works,—conditioned as required by the Act of Congress of August 13, 1894, for the performance of the contracts, and to pay all persons "*supplying labor or material* in the prosecution of the work."

The object of the bill is to ascertain the liabilities of the surety under these bonds, within the intent and meaning of the Act of Congress; to assert a lien and claim upon a fund of $26,000 within the District acquired by the Trustee in Bankruptcy; to assess a contribution upon a contract of indemnity, and to enjoin the prosecution of many actions at law brought by Bray,

the Trustee in Bankruptcy, for his personal benefit, on certain of the material claims, of which he fraudulently acquired control, and which he seeks to enforce against the surety, fraudulently and oppressively, under the mask and name of Laura Eichel.

The detailed facts show that the cause involves the consideration and construction of an Act of Congress, and presents "a matter arising under the laws of the United States," of which the Circuit Court has jurisdiction *regardless of the citizenship of the parties;* and consequently *an appeal lies to the Supreme Court from the Circuit Court of Appeals.*

This Federal question, elaborately pleaded in the bill by quotation of the statute, and by statement of particular facts,—must dispose of the motion to dismiss the appeal. The case is ruled and covered by *Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404,* overruling a motion to dismiss or affirm.

Vastly more than an injunction is sought by this bill, and the decision of the Court of Appeals, in reversing the Circuit Court and dismissing the entire suit, goes far beyond the incidental question of enjoining a vexatious multiplicity of actions at law.

The Court of Appeals decided that the bill must be dismissed, because the complainant brought suit to enforce a lien upon a fund acquired by the Trustee in Bankruptcy and in his possession; that this fund was in the exclusive jurisdiction of the Bankruptcy Court, and therefore the Circuit Court had no jurisdiction whatever of the subject matter—to decree a lien or determine a claim upon the fund; to convene persons having a right to recourse on these bonds; to ascertain the liabilities of the surety; subrogate the surety to the rights of the material men and to the Government;

to abate claims bought up by a fiduciary at a discount; to relieve against fraud, conspiracy and breaches of trust, and to enforce indemnity and assess liabilities, for contribution.

The Federal question gave jurisdiction (under the Act of 1888); the requisite diversity of citizenship existed, and the fund of $26,000 was within the District (under the Act of 1875), while the bill presented a controversy between the Fidelity Company, a citizen of Maryland, and Bray, Trustee in Bankruptcy, setting up an adverse claim "concerning property acquired by the Trustee," under section 23a of the Bankruptcy law.

The Bankrupt and the Trustee were both citizens of Indiana, and were both liable to be impleaded by this Maryland corporation, in the Circuit Court of the United States, where the property was, under section 23a.

The Circuit Court entertained the Bill, overruled demurrers, and granted an injunction against the prosecution of the actions at law.

The Court of Appeals dismissed the entire suit, on the theory, that no suit can be maintained in the Circuit Court to assert a lien or claim as to property in the hands of the Trustee in Bankruptcy. This is held on the ground that the Court in Bankruptcy, has exclusive jurisdiction of all property in the possession of the Trustee, which precludes a suit in any other court, to assert a claim or lien upon property in the hands of the Trustee.

THE MAIN AVERMENTS OF THE BILL.

1. The Maryland Corporation named as defendants, citizens of West Virginia, Indiana and Pennsylvania, and alleges that the Evansville Contract Co. was

a citizen of Indiana, and was adjudged Bankrupt in the Northern District of West Virginia. The complainant became surety prior to 1904 for the Contract Co., on four River Improvement contracts, in the respective states of West Virginia ($90,000), Pennsylvania ($50,000), South Carolina ($30,000), and Kentucky ($30,000), aggregating $200,000. These bonds were given under the Act of Congress of 1894, 28 Statutes at Large, Chap. 278, which is fully quoted, and liens are asserted under these bonds and Statutes.

2. Paragraph second is in these words: "This cause presents a controversy arising under the laws of the United States relating to Government Contracts and sureties under the Act of Congress above mentioned.

"Your orator has a lien, hereinafter fully set forth, upon a fund of over $27,000 in the hands and possession of the said Bray, Trustee, *and acquired by the said Bray, as Trustee;* and this court has jurisdiction of the cause under Section 23(a) of the Act of Congress relating to bankruptcy. Your orator has a claim against that fund adverse to the pretentions and claims and possession of the said Trustee.

"Of such fund * * * * $26,000 is deposited in equal amounts of $13,000 each in the Farmers National Bank, and in the Second National Bank of Parkersburg, *in said District*, within the jurisdiction of the Court; and this Honorable Court has jurisdiction of this cause under Section 8 of the Act of March 3, 1875, relating to suits for the enforcement of liens and the assertion of claims and the removal of clouds upon real and personal property within any District."

3. The complainant asserts liens upon that fund, and subrogation as to all rights of the Government on the one side, and of the material men on the other.

4. The Contract Co. was adjudged bankrupt in

said District, and its plant was sold for $64,000, of which $61,000 came from Dam No. 18 in the District covered by the $90,000-bond, and the Surety had a lien on that property for whatever liability should arise under that statute.

5. The fund of $26,000 in the hands of Bray, Trustee, is on deposit in the two West Virginia Banks within the District; and the complainant has a lien on all such funds for whatever may be its liability under the Statute.

6. The Contract Company defaulted and became bankrupt in 1904.

7. The Referee authorized the Trustee to borrow $75,000 to carry on the work, and to fully protect the surety on bonds given to the Government.

8. Jacob Eichel had been President of the Contract Company. He gave assurance, that the material claims aggregated about $40,000, and that large profits could be had by finishing, especially, Dam No. 18, near Parkersburg. "To this day your orator does not know what claims for material or labor are just or properly recoverable as such." (P. 24.) But the Surety agreed that if indemnified against liability on all four of those bonds, then the Surety would allow the four contracts to be completed, and the Trustees to borrow $75,000 for that purpose.

Seven banks, having an aggregate of $115,000 of unsecured debts against the bankrupt, gave a bond, each contracting for itself, and in no way liable for any other, that it would indemnify the Surety for such part of a sum not exceeding seventy-five thousand dollars as its claim bore to the sum of $115,000.

NOTE: Take the Rockport Bank, whose claim is $5,000.00; and suppose that after applying the fund in the hands of the Trustee, there should be a balance unpaid for material, of $11,500.00:—

The Rockport Bank would pay in the following proportion:—

Total bank claims stand to the deficiency, as the Rockport debt stands to its assessment, or,

$115,000 : $11,500 :: $5,000 : $500.

9. The Trustees finished the contracts. The Surety felt safe, relying on the integrity of the Trustees and the indemnity bond. The Surety employed Jacob Eichel, at five hundred dollars per month, to manage the estate; and he had assured the Surety that the material claims should be taken up and retired.

10. In November, 1904, the Referee fixed the claims for material at $40,000 at the instance of the Trustees, as a first preferred lien,and the Surety did not discover, until the time of filing the bill in, September, 1907, that the claims, with two exceptions, had been bought up at a heavy discount by the general counsel of the Trustees and by Bray, Trustee, and by Eichel, the manager, by collusion and fraud, (P. 31); these claims were falsely pretended to be the property of Laura Eichel, wife of Jacob; that all just claims of that character, should be paid out of the funds in the hands of Bray, Trustee, but that Bray, Trustee, had instituted multiplied suits in Pittsburg on those claims in the name of Laura Eichel, against the complainant.

11. All the contracts were finished by December, 1905. All the liabilities of the trustees were paid, and the borrowed money was all returned, leaving a large balance of cash. The Referee had directed and adjudged that all material claims were a first lien on the fund, but the Trustees failed to pay them. The Surety then filed a petition before the Referee, asserting its lien; and thereupon the Trustees filed a petition attacking the *priority* of the material claims, but not attacking the *amounts thereof*. The reason of this was, that Bray and Eichel and others had conspired fraudulently

to swell the figures on the material claims, which they had acquired, to the highest point as against the Surety, and to have them disallowed as a lien, with the purpose and intent, *of diverting the lien fund to the general creditors*, and of compelling the surety to pay the material claims in full; and meantime over ninety per cent of the common debts had been assigned to Eichel. Thus, Bray was in collusion with Eichel to establish fraudulent claims as material debts, and to enforce them against the surety, and at the same time to apply the funds on the common debts in the hands of Eichel.

Bray had become sole Trustee.

Bray and Eichel had obtained control of substantially all of the debts of the bankrupt and control of the trusteeship, and were abusing the trusts and defrauding the surety; and they had further acquired claims of the indemnitor banks, and guaranteed the banks against their indemnity, and were harassing and thwarting the surety who had trusted them, and whom it was their duty to protect. (pp. 41-44.)

It was necessary to ascertain "the claims which are proper charges for material and labor under the Act of Congress;" and the surety was entitled to the enforcement of the lien and a full and complete adjustment of all liabilities, and a contribution under the contract of indemnity, with an injunction against the suits fraudulently brought by Bray, Trustee, in Mrs. Eichel's name, in Pittsburg.

On page 44 is this paragraph: "*Your orator has applied to said District Court for permission to file this bill, and such permission and leave have been granted, as shown by its order in that behalf.*" (Copied below.)

The prayers are, to decree a lien upon the fund in the hands of the Trustee for these material claims; that the fund be applied to whatever are just debts owed by the bankrupt for "material supplied within

the meaning of said Act of Congress;" that the claims in the hands of Bray and Eichel be reduced to actual cost; that an accounting be had, and all liabilities on the bonds determined; that the indemnitor banks be required to pay whatever remains after applying the primary fund which is in the hands of the Trustee;that all actions at law be enjoined; and for general relief.

The District Court made an order in these words:

"In the matter of Evansville Contract Co.,
Bankrupt, in Bankruptcy.

This day the United States Fidelity & Guaranty Co. presented its petition accompanied by a bill in equity, wherein the said company is complainant, and M. J. Bray, et al., are defendants, and moved the Court to be allowed to file such bill in the Circuit Court of the United States against the said M. J. Bray and other persons named; and the said petition is ordered to be filed at Parkersburg. Upon consideration whereof, it is ordered, adjudged and decreed, that leave and permission be and are granted unto the United States Fidelity & Guaranty Co. to file such bill in the Circuit Court of the United States for this District; and that the same *shall not be deemed to be in contempt or derogation of the powers and jurisdiction of this Court, but rather as ancillary thereto.*"

(Record of the C. C. A., p. 74.)

Upon filing that bill, the Circuit Court granted a temporary restraining order, and set a day for hearing the application for an injunction, and awarded process against the non-residents, under section 8 of the Act of 1875. (Ib. p. 76.)

Upon full argument, the Circuit Court overruled all demurrers and motions to dismiss the bill, and gave

time to answer, and issued an injunction against the prosecution of the numerous suits in Pittsburg; providing, that the decree should be without prejudice to any proceeding in Bankruptcy; and that the proceedings in the Circuit Court shall not, until further order, interfere with the proceedings in the Bankrupt Court. (Ib. p. 237.)

The Honorable Alston G. Dayton of the District Court, made the order in the Circuit Court. From that order, appeals were taken to the Circuit Court of Appeals.

On June 7, 1909, the Court of Appeals made a decree to dismiss the bill without prejudice, and reversing the Circuit Court.

On June 27, the United States Fidelity & Guaranty Co. filed its petition for an appeal, which was not acted upon until July 14th.

The Petition for the appeal to the Supreme Court Contains the following:

1. That in the above entitled cause there was rendered and filed a final decree in the United States Circuit Court of Appeals for the Fourth Circuit, in the above entitled and numbered cause, on the 5th day of June, 1909, reversing the decree of the United States Circuit Court for the Northern District of West Virginia, and dismissing the Bill filed by your Petitioner, and by the decree and judgment aforesaid of the Honorable Circuit Court of Appeals in reversing the decree of the Circuit Court, and in dismissing your Petitioner's Bill, manifest error has intervened, and your Petitioner has been prejudiced and aggreived.

2. That the matter in controversy in said suit exceeds the sum of Five thousand dollars, besides costs and exclusive of costs and interest; and that this is not

a case in which the decision of the said Circuit Court of Appeals is made final and non-appealable, but is a case proper to be reviewed by the Supreme Court of the United States upon appeal.

3. *That the said cause arose under and was based upon statutes of the United States*, which statutes were pleaded upon the face of the Bill, and entered as essential elements in the determination of the rights of the parties, viz:

(1) The act of August 13, 1894 (28 Statutes at Large, 278, Chapter 280), entitled "An Act for the Protection of Persons furnishing materials and labor for the construction of Public Works."

(2) Sec. 23a of the Act of Congress of 1898, relating to Bankruptcy, whereby the Circuit Court has jurisdiction of all controversies * * * * * between Trustees as such and claimants concerning property acquired or claimed by the trustee, etc.

4. The Supreme Court has jurisdiction by appeal of the matters decided by the said Circuit Court of Appeals; and the jurisdiction below did not depend upon diverse citizenship.

5. Your Petitioner herewith files an assignment of errors to the decree complained of, and tenders any bond that your Honors may require.

Wherefore, the Petitioner prays etc.

ASSIGNMENT OF ERRORS.

The said Appellant, U. S. Fidelity & Guaranty Co. assigns the following grounds of error, to the judgment, decree and opinion, filed and entered in above cause on the 5th day of June, 1909:

It was error —

1. To hold that the Circuit Court had no jurisdiction of the subject matter, for the alleged reason that

the fund claimed by the plaintiff and appellant, and in the possession of Bray, Trustee, in Bankruptcy,—was in the exclusive control of the District Court.

Sec. 23a of the Act of 1898 gives jurisdiction in exactly that case.

2. It was error, to hold and decide that the plaintiff and appellant had no right by a plenary suit in the Circuit Court, to enforce a lien derived under a Statute of the United States, against the Trustee in Bankruptcy, who had acquired the fund, which plaintiff was claiming.

3. It was error, to hold that the United States Circuit Court had no jurisdiction to consider and adjudge any right or claim of lien against the fund of $27,000 in the hands of Bray, Trustee; especially when the Honorable District Court had expressly sanctioned and approved the bringing of the suit, upon application duly made.

4. It was error to reverse the Decree of the Circuit Court, awarding an injunction against a multiplicity of suits brought, fraudulently, in the name of Mrs. Eichel for the benefit of Bray, Trustee, upon material claims, purchased by Bray, Trustee, at a discount, which he had been authorized to pay out of the funds in his hands—the primary fund for satisfying them.

5. It was error to deny relief to the surety, who was being oppressed by the fraud of Bray, Trustee, and his associates,— it being their duty to protect the surety.

6. It was error to decide that the Circuit Court had no jurisdiction of the complainant's Bill.

7. It was error to hold and decide, that the fund to which claim was made, and upon which a lien was charged, *held and located in the Northern District of West Virginia, in the possession of the Trustee of a*

Bankrupt Indiana corporation, was not within the jurisdiction of the Circuit Court, under Section 8 of the Act of March, 1875, (18 Statutes, 470, 472,) relating to jurisdiction of the Circuit Court.

8. It was error to hold and decide, that the District Court has power to protect all interests in a Bankrupt Estate, and, therefore, no Bill can be entertained in the Circuit Court, either to procure the adjudication of a lien upon funds in the hands of the Trustee, *or to administer relief outside of the estate*, as by enforcing an indemnity contract after ascertaining the amount applicable to the liability and the excess proper to be decreed against indemnitors.

9. It was error to dismiss the Bill for want of judicial power, on demurrers which go to the merits, on general equity jurisdiction.

10. It was error to deny to the Circuit Court, Federal judicial power, of a Bill asserting rights founded upon Statutes of the United States, claiming a fund and a lien thereon, actually located in the District, in the hands of a Trustee of a Bankrupt, against which Bankrupt, the plaintiff could have filed such Bill, prior to the Bankruptcy, under Sec. 23a of the Acts of 1898.

For these and other errors apparent on the record, the appellant undersigned prays that the final order, judgment and decree of the said Circuit Court of Appeals may be reversed and that the decree of the Circuit Court for the Northern District of West Virginia may be affirmed.

ARGUMENT.

THE MOTIONS OF THE APPELLEES ARE, TO DISMISS, TO AFFIRM, AND TO ADVANCE.

I

UPON THE MOTION TO DISMISS

Two grounds are assigned for this motion:

1. That no appeal lies from the decision of the Court of Appeals;

2. That the Court of Appeals dissolved an injunction, and no appeal to the Supreme Court was taken within thirty days from that decision.

Taking these in order:—

1. The right of appeal to the Supreme Court is settled by Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404, holding—

"Although diversity of citizenship is alleged in the bill, if the grounds of the suit and relief are also based on statutes of the United States, which, as in this case, are necessary elements of the decision of the Circuit Court of Appeals, an appeal lies from the judgment of that court to this Court.

"The equity of the surety on a bond given by a contractor under the Act of Congress of August 13, 1894, 28 Stat. 278, who, by reason of the contractor's default, has been obliged to pay material men and laborers, is superior to that of a bank loaning money to the contractor. In such case the surety is subrogated to the rights of the contractor."

In overruling the motion to dismiss, the Chief Justice wrote (208 U. S. 409): "Diversity of citizenship was alleged, but grounds of suit and relief were also based on statutes of the United States. Those Statutes

entered as elements into the decision, and were necessary elements. Howard v. U. S. 184 U. S. 676; Warren v. Searle, 191 U. S. 195, 205."

The Howard case gives an extended list of citations, to the effect, that a suit upon a bond given under a Federal Statute and involving the question of the liability arising under such Statute, is a suit arising under the United States laws, and an appeal in such a case lies to the Supreme Court.

In re Winn, 213 U. S. 458, the opinion is: "It is the settled interpretation of the words 'arising under the Constitution or laws of the United States', that a suit arises under said Constitution or laws, when the plaintiff's statement of his cause of action shows that it is based upon those laws or that Constitution."

The bill in this case seeks an ascertainment of what are the claims that have right of recourse on these bonds, within the meaning of the Act of Congress.

Section 6 of the Act of 1891 gives an appeal to the Supreme Court as a matter of *right*, where a Federal question is thus presented. We submit that the frequent adjudications on this subject, and the direct decision of the Supreme Court on a bond given by this appellant, in the exact language of the same Statute, not only disposes of the motion, but also shows that there was no color for it.

2. *Upon the time for taking the appeal.*

The limitation of an appeal from the Circuit Court of Appeals to the Supreme Court under the Act of 1891, is one year. The decision was rendered in June, and the appeal was perfected in July, 1909.

Allen v. Southern Pacific R. R. Co., 173 U. S. 479.
Holt v. Indiana Co., 176 U. S. 70.

In the Allen case, 173 U. S. at page 485-7, we read:

"The Act of 1891, Sec. 6, defines the jurisdiction of the Court of Appeals, and determines in what classes of cases the jurisdiction of such Courts is to be final. After making these provisions, the concluding part of Section 6 provides as follows: "In all cases not heretofore in this section made final, there *shall be, by right*, an appeal or writ of error, or review of the case by the Supreme Court, where the amount exceeds one thousand dollars besides costs; but no such appeal shall be taken, or writ of error sued out, unless within one year after the entry of the order, judgment or decree sought to be reviewed."

It is true that where a party enjoined in the Circuit Court, desires to appeal to the Circuit Court of Appeals, from an order of injunction, his limitation is thirty days under the Act of 1906; but the appellant here never was enjoined. It has not taken an appeal to complain of being enjoined, nor are we now in the Honorable Circuit Court of Appeals.

Our complaint is, that our entire suit was dismissed and relief denied; and we appeal within a few days.

II

UPON THE MOTION TO AFFIRM.

There is no color for the motion to dismiss; and, therefore, the motion to affirm amounts to a request to prematurely decide the appeal on its merits.

The opposing brief insists that the decree dismissing the bill should be affirmed without hearing, on the grounds that the appeal is frivolous and intended for delay, and that it is manifest that the Circuit Court had no jurisdiction, because the fund in the Northern District of West Virginia was in the possession of the

Trustee, and was therefore in the exclusive jurisdiction of the Bankruptcy Court.

The fund was not in the Registry of the District Court. That Court had not possession "other than the constructive possession in every case created by adjudication," which would not preclude a *State Court* from entertaining a suit impleading the Trustee.

Frank v. Volkommer, 205 U. S. 521, 529.

The fund was property "acquired by the Trustee" of an Indiana Bankrupt. The Maryland Fidelity Co. was an adverse claimant, and would have had the right to enforce its claim in the Circuit Court against the Bankrupt, if Bankruptcy proceedings had not been instituted.

(a) It had the right to resort to the Circuit Court by reason of the Federal question presented.

Henningsen v. U. S. Fidelity & Guaranty Co., 208 U. S. 404.

(b) The fund was in the District, and the requisite diversity of citizenship existed, and therefore, the suit could also have been brought against the Bankrupt Contract Co. under the Act of March, 1875, if bankruptcy had not intervened.

Citizens Savings & Trust Co. v. Ill. R. R. Co., 205 U. S. 46.

By Section 23a of the Bankruptcy Law, "The United States *Circuit Court* shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in Bankruptcy, between Trustees, as such, and adverse claimants, concerning the property acquired or claimed by the Trustees, in the same man-

ner, and to the same extent only, as though Bankruptcy Proceeding had not been instituted , and such controversies had been between the Bankrupts and such adverse claimants."

It is generally understood that the object of that section was to restrict the jurisdiction of the Federal Circuit Court, so that cases could be brought in it or removed to it, only where that Court would have had jurisdiction, independent of the Federal nature of Bankruptcy and of the Federal character of the Trustee; and to give to *State Courts* a current jurisdiction in all cases where the Circuit Court would have had jurisdiction, without bankruptcy. The effect of that statute is, also, to give jurisdiction to State Courts, of all controversies with relation to property acquired or claimed by a Trustee, except where there would have been jurisdiction in the United States Circuit Court, if there had been no Bankruptcy.

That Section 23(a) recognizes the right of a party to a plenary suit, in a controversy with a Trustee in Bankruptcy—to have a regularly constituted Court, State or Federal, as the case may be, having regularity of sessions, of proceedings, of maturing of causes, under orderly process. The Trustee is not the Bankruptcy Court. His possession and his personality are made distinct, for the purpose of litigating questions that affect the creditors for whom he is Trustee.

To deny the right to sue a Trustee in the Circuit Court, when a claimant brings himself squarely within Section 23(a), is to nullify that Section. *To deny that right, on the ground that property acquired by the Trustee and claimed by another, is within the exclusive jurisdiction of the District Court, is to defeat both the letter and the intent.*

In Frank v. Volkommer, 205 U. S. 521, the point

adjudicated, was, that the possession by a Court of Bankruptcy of proceeds of sale of a chattel, covered by a mortgage given by the bankrupt, does not deprive the State Court of jurisdiction of a suit to set aside the mortgage as fraudulent.

Mr. Chief Justice Fuller writes (205 U. S. p. 526): "Counsel for plaintiffs in error contended below, that the State Court had no jurisdiction, because the suit was brought to determine title to property or a fund in the possession of the District Court of the United States."

At page 528, "undoubtedly the State Court in which the Trustee brought this suit was the court where the bankrupt * * * * might have brought or prosecuted 'if proceedings in bankruptcy had not been instituted,' and its jurisdiction under the applicable rule must be conceded; but the plaintiffs in error contend that the possession by the Bankruptcy Court of the proceeds of sale of the mortgaged chattels, deprives the State Court of its conceded jurisdiction to set aside the mortgage as fraudulent."

"The contention is wholly inadmissible."

Again at page 529: "No principle of comity was violated and there was no interference with the bankruptcy court. First National Bank v. Title & Trust Company, 198 U. S. 280; Davis v. Friedlander, 104 U. S. 570; Eyster v. Gaff, 91 U. S. 521; Chaflin v. Houseman, 93 U. S. 130; Re Platteville Foundry & Machine Company, 147 Fed. Rep. 828; Guaranty Trust Company v. North Chicago Street Railroad Company, 130 Fed. Rep. 801; Re Spitzer, 130 Fed. Rep. 879; Bindseil v. Smith, 61 N. J. Eq. 645; Skilton v. Coddington, 185 N. Y. 80. In the later case the Court of Appeals by Cullen, C. J., *in sustaining the jurisdiction of the State Court*, admirably expounds the applicable principles,

with a full citation of authorities. *That was a suit against the trustee*, while the present case was brought by the trustee.

"The possession of the temporary receiver of the special fund was not, in the circumstances, in any sense sufficient to change the ordinary rule giving the state courts jurisdiction, any more than the constructive possession in every case created by adjudication. Mueller v. Nugent, 184 U. S. 1; York Mfg. Company v. Cassell, 201 U. S. 344."

The decision in the Skilton case, 185 N. Y. 80,—so strongly commended above by the Supreme Court, is—"Where a Bankrupt's Trustee sold property of the bankrupt which was subject to a chattel mortgage, and reserved amounts to pay liens on the property, the holder of the chattel mortgage was *entitled to sue the Trustee*, in a *State Court* to establish his claim on such note and mortgage; and a judgment in such suit in a State Court, in favor of the chattel mortgage, could not operate *to take the fund from the possession* of the Bankruptcy Court."

In Bardes v. Bank, 178 U. S., at p. 535, attention is called to the omission of any jurisdiction of a plenary suit in equity, under Section 2 of the Bankruptcy Act of 1898.

The Bankruptcy law was amended in 1903, so as to enlarge the jurisdiction of the District Court; but not to authorize relief outside of the gathering and distribution of assets.

The Bankruptcy Court cannot give a judgment or decree against an endorser for what the estate of a Bankrupt fails to pay.

The Surety Co. has a right to bring a plenary suit. This fund, as alleged by the Bill, is no asset for general creditors. We have a lien upon it, and we are entitled to assert that lien in the Circuit Court, by

reason of our citizenship, as well as by reason of the federal question; and Sec. 23a holds open the Circuit Court.

We must bear in mind that the Bankruptcy Court gave full sanction to the filing of the bill now under consideration, and the same judge was holding both Courts.

(Motion papers, page 44.)

Ingersoll v. Coram, 211 U. S. 335, upheld the jurisdiction of the Circuit Court of the United States, of a suit to enforce a lien upon a fund under the administration of a *State Court* of Massachusetts, because the fund was within the District. The opinion at page 359 distinguishes "the line of cases of which Wabash Railroad Co. v. Adelbert College, 208 U. S., is an example," (where a State Court undertook to sell and give possession of a railroad that was in the actual grasp of a Federal Court); and the distinction is made, from those cases, the object and purpose of which is to get *an adjudication of a lien upon a fund*, where this can be done without interfering with the court which has the administration, and without producing a clash of control or possession.

Ingersoll v. Coram, 211 U. S., presents a question of jurisdiction between a Federal and a State Court, where many considerations of comity and of forbearance must operate; while the bill in our case was welcomed by the District Court, of the same sovereign as the Circuit Court, and was furthermore, expressly authorized by Sec. 23(a) of the Statute that created the Bankruptcy Court.

The appellant's right to the lien claimed cannot be doubted. It has equity, to require the ascertainment of the liability and the application of the primary fund to satisfy it; to require equitable contribution from the indemnitors, and to settle all questions arising

out of these controversies in one comprehensive suit.

Indeed, in a supplemental typewritten brief, it is solemnly urged by the appellees, that the bill shows that the fund in the hands of the Trustee is $27,600, while the claims upon which Bray has brought many suits in the name of Laura Eichel, amount to about $40,000, and, hence, the plaintiff in those actions at law, has a right to recover the excess of $13,000 over and above the lien fund. This well illustrates our case and the necessity of a suit in equity to determine the rights of the parties.

There are other material claims, besides those owned by Bray.

The Bray claims must be purged of the speculative profits on the various purchases. Some of them are wholly fraudulent.

If we once learn definitely the amount in the hands of the Trustee, and the amount of all these material claims, and if we apply this fund pro rata to these numerous debts,—then there can be *no need for allowing the suits to proceed at law*, because the Circuit Court would immediately give judgment for any deficiency in favor of the owners of those claims against the Fidelity Co., and the court would at the same time give a decree in favor of the Fidelity Co. against the indemnitors, and make an assessment upon them to contribute whatever is necessary to make up that deficiency.

Those actions at law cannot be prosecuted for the excess over and above the lien fund, until the amount of that lien fund shall first have been ascertained and applied.

The Circuit Court is the only tribunal that can effectively do complete justice between all the parties. The District Court can determine liens and can make orders for the distribution of the Bankrupt's estate;

but it is not administering the estate of the surety, and it can render no decree determining the liability of the surety, or relieving the surety by contribution. It can grant no relief whatever in favor of the surety, so far as concerns the ascertainment of its liability, except with a view to a distribution of the Bankrupt's assets. The Decision of the District Court would not bind the indemnitors, and might not bind the Claimants as to the amounts, or as to any other question, arising upon the liability of the bonds.

The Circuit Court having power to grant full relief and do complete justice between all these parties, and to satisfy every claim for materials; by applying the lien fund, and giving decrees for the excess; it had the power to enjoin Bray, et al., from the fraudulent prosecution of a multiplicity of suits.

This right of the surety to settle all these controversies in one case, by bringing together every party in interest and making one decree binding all, is a substantial and a valuable right; and we have asserted that right in the only court which can afford full, adequate and complete relief.

THE PRESENT LAW REQUIRES ONE SUIT IN EQUITY.

Since this Act of 1894 was enacted, Congress has passed an act on the same subject, on February 24th, 1905. Especial atention is directed to the provision of the new act, that only one suit shall be brought to determine the liability on the contractor's bond, "only one action shall be brought" * * * "The surety may pay into court the full amount of his liability." (33 Stats. at Large 811.) The Supreme Court has several times referred to the Statute of 1905 in passing upon the scope and purpose of that of 1894.

In U. S. vs. American Surety Company, 200 U. S. 199, the court says at page 201, "The Act of 1894 has

been materially amended by the Act of 1905 * * * . While not governing the present action, the amended act has some bearing in construing the act in question." Again at page 204, "looking to the terms of this statute in its original form, we find the same congressional purpose."

In U. S. Fidelity & Guaranty Co. vs. U. S. 204, U. S. 349, the matter arose under the Act of 1894; but at page 359, the opinion refers to the act of 1905, and then proceeds. "This statute can have no direct application here * * * * nevertheless it throws some light on the meaning of the Act of 1894."

We submit that Congress, in its wisdom, and in view of the difficulties of ascertaining the liability on such a bond, has clearly sanctioned the principle of bringing one suit.

It can hardly be said that our insistence upon the maintaining of this one proceeding, is a light matter, when the present act forbids more than one suit.

The number of cases which have gone from the Circuit Court of Appeals to the Supreme Court, and have there been decided on full hearing, is ample proof that the jurisdiction has been recognized and upheld.

U. S. Fidelity & Guaranty Co. vs. Golden Co., 191 U. S. 416.
U. S. Fidelity & Guaranty Co. vs. U. S. 414
U. S. Fidelity & Guaranty Co. vs. U. S. 204, U. S. 349.
Henningsen vs. Fidelity Co. 208, U. S. 404
Hill vs. American Surety Co. 200 U. S. 197.
Hardaway vs. National Surety Co. 211 U. S. 552, the latter case again affirming the lien on the fund.

Wholly unfounded is the suggestion, that this ap-

peal is taken for delay, and that the right of injunction is alone involved.

The appellant has nothing to gain by delay. It complains that the Court of Appeals, has refused all relief, and denied the existence of any judicial power, *State* or *Federal*, outside of the District Court.

It is true, that the Court of Appeals dissolved the interlocutory injunction, and that the complainant believes that this is error, which will be corrected; but the matter of the injunction is not the basis of the right of appeal here. That lies in the Federal question; and a further discussion of the merits of the appeal is not proper this time.

III

UPON THE MOTION TO ADVANCE.

We have no objections to advancing this cause, provided reasonable time is given for preparation.

No statute or rule, however, requires it; because this is not a case brought here direct from a Circuit Court or District Court, on the sole question of jurisdiction, under the Act of 1891; but we present an appeal from the Circuit Court of Appeals, from a decree dismissing a Bill and denying all relief, where the injunction is only one feature.

We respectfully submit that the motion to dismiss and to affirm, should be denied.

UNITED STATES FIDELITY & GUARANTY CO.,
By Counsel.

W. W. Van Winkle,
M. G. Ambler,
B. M. Ambler,
Counsel for Appellee.

Parkersburg, W. Va.,
October, 1909.

1. A MOTION TO DISMISS AN APPEAL FROM A FINAL DECREE OF A CIRCUIT COURT OF APPEALS, IS DENIED, WHERE THE SUIT ARISES UPON A BOND CONDITIONED ACCORDING TO THE ACT OF CONGRESS OF AUG. 13, 1894, "FOR THE PROTECTION OF PERSONS FURNISHING MATERIAL AND LABOR FOR THE CONSTRUCTION OF PUBLIC WORKS."

HENNINGSEN VS. U. S. FIDELITY & G. CO., 208 U. S. 404.

2. ONE YEAR IS THE LIMIT FOR SUCH AN APPEAL, UNDER SEC. 6 "OF THE ACT OF 1891."

ALLEN VS. SO. PAC. R. R. CO., 173 U. S. 485-7.

FILED.
OCT 4 1909
JAMES H. McKENN

IN THE

Supreme Court of the United States

The United States Fidelity and Guaranty Company, *Appellant*,

vs.

M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Company, Bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; The Second National Bank of Parkersburg, West Virginia; The Farmers & Mechanics National Bank of Parkersburg, West Virginia; The Farmers Bank of Rockport, Indiana; The Riter-Conley Company, and the Nicolette Lumber Company, *Appellees*.

No. [redacted] 11
October Term, 1909.

Appeal from the Decree of the Circuit Court of Appeals for the Fourth Circuit.

Appellees' Motion to Dismiss, &c.

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Attorneys for Appellees.

IN THE

Supreme Court of the United States.

The United States Fidelity and Guaranty Company, Appellant,

vs.

M. J. Bray, M. J. Bray, Trustee of The Evansville Contract Company, bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana, The Second National Bank of Parkersburg, West Virginia; The Farmers and Mechanics National Bank of Parkersburg, West Virginia; The Farmers Bank of Rockport, Indiana; the Riter-Conley Company; and the Nicolette Lumber Company, Appellees.

No. 565 October Term, 1909.

Appeal from the Decree of the Circuit Court of Appeals for the Fourth Circuit.

Motion to Dismiss and Affirm.

To the Honorable, the Judges of the Supreme Court of the United States:

The appellees, M. J. Bray, M. J. Bray, Trustee of The Evansville Contract Company, bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; the Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; ~~The~~

~~Farmers & Mechanics National Bank of Parkersburg, West Virginia;~~ The Farmers Bank of Rockport, Indiana; ~~the Riter-Conley Company~~, and the Nicolette Lumber Company, by their attorneys and counsel, move the court to dismiss the appeal in this case, and to affirm the decree of the Circuit Court of Appeals, for the following reasons:

FIRST. The decree of the Circuit Court of Appeals was entered on the 5th day of June, 1909; the appeal was allowed July 14th, 1909. This is an injunction bill, the Circuit Court having granted the injunction restraining suits at law. The Seventh Section of the Act of the third of March, 1891, relating to appeals and injunction cases, as amended in final form by the Act of the fourteenth of April, 1906, Chapter 1627, 34 Statutes at Large, 116, provides: "That where upon a hearing in equity in a district or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed, by an interlocutory order or decree in any cause, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals; Provided that the appeal must be taken within thirty days from entry of such order or decree, and it shall take precedence in the appellate court * * *." This appeal was not taken within thirty days.

SECOND. The record in this appeal shows that this Court has no jurisdiction, and that the appeal will not lie—the decree of the Circuit Court of Appeals being final, for the reason that no other cause of jurisdiction in the Circuit Court existed except as to diversity of citizenship.

THIRD. It is manifest that the appeal was taken for delay only, and that the question on which the jurisdiction is alleged to be dependent is so frivolous as not to need further argument.

AND IN SUPPORT OF THIS RULE THE FOLLOWING BRIEF STATEMENT OF MATTERS INVOLVED IS SUBMITTED:

The facts alleged in the bill of complaint are clearly found in the opinion of the Circuit Court of Appeals, reported in Advance Sheets of the Federal Reporter, vol. 170, page 689. In substance, for the purposes of this case, the facts are reducible as follows: The Evansville Contract Company secured The United States Fidelity and Guaranty Company as its bondsman on a number of contracts with the United States Goverment for river improvement; it proceeded to do the work; about sixteen individuals and corporations furnished it material used in the progress of the work; after the work had been proceeded with to some extent the company failed; Bray and others were appointed receivers and trustees in bankruptcy in a proceeding in the Northern District of West Virginia. Laura Eichel, one of the appellees, bought up the claims of these sixteen individuals and corporations, which were supposed to be secured by the bonds of The United States Fidelity Guaranty Company. The appellant claims that Laura Eichel's ownership is not bona fide, but that Jacob Eichel, the president of the company, and Bray, the trustee, own these claims, which now aggregate between forty-five and fifty thousand dollars with interest. The finishing of the contracts by the trustee of the bankrupt and the settlement of the estate finally leaves in the Court of Bankruptcy, deposited in its depositaries at

Parkersburg, West Virginia, about thirty-six thousand dollars. This sum has been reduced by costs and charges. Laura Eichel then sued on these sixteen assigned claims of material men in the state court at Pittsburgh, Pennsylvania, and the United States Court there, and got service upon The United States Fidelity and Guaranty Company, and the cases were proceeded with by entry of appearance, etc. This bill was then filed to restrain further proceedings on these suits in the name of Laura Eichel, on the ground that there is a fund situate in the Northern District of West Virginia, upon which various parties claim liens—namely, this fund in the District Court of Bankruptcy– and seeking to bring all parties, including these Indiana defendants and appellees, before the Circuit Court by substituted service to adjudicate the rights of all parties to this fund, and further, to enjoin Laura Eichel and all other of these appellees from proceeding against The United States Fidelity and Guaranty Company, and generally for the total relief and quit-claim of The United States Fidelity and Guaranty Company against all of these claims.

The position taken by these appellees in the Circuit Court and the Circuit Court of Appeals in support of their demurrers were, briefly, that there was no fund in the contemplation of the Act of Congress relating to absent defendants in suits to enforce liens, being Section 8 of the Act of the third of March, 1875, 18 Statutes at Large, 472; that the fund was in the exclusive jurisdiction of the District Court in Bankruptcy; and that these defendants could not be brought into the Circuit Court of the Northern District of West Virginia in this

suit, as they had the privilege of being sued in their own district.

The Circuit Court permanently enjoined the suits of Laura Eichel. This decree was reversed on June 5, 1909, by the Court of Appeals, see copy of its decree herewith printed. Opinion as reported in 170 Fed Rep 689

Brief of Law.

In addition to the precedents cited in the opinion of the Circuit Court of Appeals, 170 Federal Reporter 689, the following cases are cited to sustain the proposition that the District Court has exclusive jurisdiction:

Wabash R. Co. vs. Adelbert College, 208 U. S. 379, 642.

Where the fund is in the hands of a competent court of exclusive jurisdiction, there can be no such thing as a lien claimed upon it.

"When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or the control of the property."

James T. Shields, Jr., Receiver, vs. John Coleman et al., 157 U. S. 169, where the gist of the decision is:

"The circuit court of the United States, when property is in the possession of a receiver appointed by a state court, has no power to appoint another receiver and take the property out of the former's hands."

Watson Freeman, Marshal, U. S., vs. Jabez C. Howe et al., 65 U. S. 450, part of the syllabus (well drawn) of which is as follows: "In the case of conflicting authorities under a state and federal process, on which property has been seized, the question as to which authority shall for the time prevail, does not depend upon the rights of the respective parties to the property seized, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process."

It is urged that this so-called question of jurisdiction does not involve a question of the jurisdiction of the Circuit Court as a federal tribunal. There is no real federal question involved, nor is there any question "arising out of the Constitution or laws of the United States," as referred to in the First Section of the Act of the third of March, 1875, Chapter 137, 18 Statutes at Large, 470, defining the jurisdiction of the Circuit Court. The only question here is one of fact: *Is there a fund in the Northern District of West Virginia as to which these various parties are asserting a lien?* There is no such fund, we submit; there is a fund in the hands of the Court of Bankruptcy, which court has full and exclusive power to distribute.

It was decided in Louisville Trust Company vs. Knott, 191 U. S., at page 225, 48 L. Ed. 159, as follows: "The question whether a Federal circuit court, under the principles of equity and comity governing all courts having concurrent jurisdiction over the

same subject-matter, has authority to administer a trust estate after a suit with reference thereto has been begun in a state court, does not involve the jurisdiction of the circuit court as a Federal tribunal, which, alone, under the act of March 3, 1891, chapter 517, §5 (26 Stat. at L. 826, U. S. Comp. Stat. 1901 p. 549), can furnish ground for a direct appeal to the Federal Supreme Court as a case in which 'the jurisdiction of the court is in issue.'"

The court, in the opinion at pages 232 and 233, use the following language:

"The question presented by the certificate of the circuit court is not one of jurisdiction, within the meaning of the 5th section of the act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citizenship of the parties to this suit, instituted by Stewart R. Knott, as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the circuit court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company. What the circuit court did in that respect was questioned by the Trust Company, on behalf of the state court, solely upon the ground that the taking by the Federal court of possession of the property and assets of the Post Company—after the state court, by the institution of the Haldeman suit, had acquired authority to appoint a receiver of such property and assets for administration—was in violation of the rule recognized in courts of equity, whether of Federal or state origin, that 'where

the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;' that as the object of the suit in the state court could not be accomplished without possession of the property and assets of the Post Company, the seizure of such property and assets under the order of the Federal Court, whereby the state court was prevented from giving any effectual relief to the parties before it, was inconsistent with the relations which, upon principles of comity and right, always exist between courts having concurrent jurisdiction over the same subject-matter. Peck vs. Jennes, 7 How. 624, 12 L. Ed. 846; Saylor vs. Carryl, 20 How. 596, 15 L. Ed. 1032.

"In all this there was nothing involving the jurisdiction of the circuit court as a Federal tribunal, whose jurisdiction is regulated by acts of congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

It is submitted that the answer to this question is even more plain in a case where there is not a dispute as to the relative jurisdictions of the federal and state courts and where there is an attempt to withdraw from the district court to the circuit court jurisdiction over a fund which is within its hands.

There is gathered together a list of cases in the fourth volume of Federal Statutes Annotated, on page 281, and the editors have deduced the following rule,

which is given in their language: "Substantial Dispute as to Construction of Constitution, Law or Treaty Essential—Whether a suit is one that arises under the Constitution or laws or treaties of the United States is determined by the questions involved. If from them it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution, or law, or a treaty of the United States, or sustained by the opposite construction, and that the suit is one which does really and substantially involve a dispute or controversy as to the right which depends upon the construction of the Constitution, or some law, or treaty of the United States, then the case is one arising under the Constitution, law or treaty, otherwise the jurisdiction cannot be maintained on this ground. Newburyport Water Co. vs. Newburyport (1904), 193 U. S. 561; Defiance Water Co. vs. Defiance (1903), 191 U. S. 184; Western Union Tel. Co. vs. Ann Arbor R. Co. (1900), 178 U. S. 239; McCain vs. Des Moines (1899), 174 U. S. 168; New Orleans vs. Benjamin (1894), 153 U. S. 411; Tennessee vs. Union, etc., Bank (1894), 152 U. S. 454; Shreveport vs. Cole (1889), 129 U. S. 36; Carson vs. Dunham (1887), 121 U. S. 421; Germania Insurance Co. vs. Wisconsin (1886), 119 U. S. 473; Starin vs. New York (1885), 115 U. S. 257; Ames vs. Kansas (1884), 111 U. S. 449; Gold-Washing, etc., Co. vs. Keyes (1877), 96 U. S. 199; Joy vs. St. Louis (1903), 122 Fed. Rep. 528; Minnesota vs. Duluth, etc., R. Co. (1898), 87 Fed. Rep. 497; Crystal Springs Land, etc., Co. vs. Los Angeles (1896), 76 Fed. Rep. 151; Sawyer vs. Concordia (1882), 12 Fed. Rep. 754; Dowell vs. Griswold (1877), 5 Sawy. (U. S) 39, 7 Fed. Cas. No. 4,041. 'The judi-

cial power extends to all cases in law and equity arising under the Constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the Circuit Court that the cause of action should depend upon the construction and application of the Constitution.' New Orleans vs. Benjamin (1894), 153 U. S. 411."

We cite the rule as applied in

Newburyport Water Co. vs. Newburyport, 193 U. S. 576; 48 L. Ed. 799.

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit."

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. *If from them it appears that some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States.*" Cooke vs. Avery, 147 U. S. 385, 37 L. Ed. 212, citing Osborn vs. Bank of United States, 22 U. S. 9 Wheat. 738, 6 L. Ed. 204; Starin vs. New York, 115 U. S. 248, 257, 29 L. Ed. 388, 390.

Certainly it cannot be possible that a federal question is involved. When there is *no* shadow of a doubt

that the District Court has exclusive jurisdiction of a fund in its custody, "no title, right, privilege or immunity" is involved.

It is, therefore, respectfully submitted that the question on which the jurisdictional question depends in this case is so frivolous as to need no further argument.

J. A. DUPUY,
WILLIAM M. HALL,
Attorneys for Appellees.

See addendum - pp 11a and 11b back of book -

L. T. MICHENER,
OF COUNSEL.

IN THE

Supreme Court of the United States.

The United States Fidelity and Guaranty Company, Appellant,

vs.

M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Company, bankrupt; Jacob Eichel, Laura Eichel, The City National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; The First National Bank of Evansville, Indiana; The First National Bank of Rockport, Indiana; The Second National Bank of Parkersburg, West Virginia; The Farmers and Mechanics National Bank of Parkersburg, West Virginia; The Farmers Bank of Rockport, Indiana; The Riter-Conley Company; and the Nicolette Lumber Company, Appellees.

No. 565 October Term, 1909.

Appeal from the Decree of the Circuit Court of Appeals for the Fourth Circuit.

Motion to Advance.

To the Honorable, the Judges of the Supreme Court of the United States.

The appellees, M. J. Bray, Jacob Eichel, and Laura Eichel, by their attorneys and counsel, move the Court to advance this case for argument, for the following reasons:

First. The case is one in which an injunction has been issued by the Circuit Court for the Northern District of West Virginia, restraining suits at law by these

appellees on certain claims alleged to be held by them against the appellant, and by the provisions of the Seventh Section of the Act of the third of March, 1891, as amended by the Act of the fourteenth of April 1906, Chapter 1627, 34 Statutes at Large, 116, such a case shall take precedence in the appellate court.

SECOND. This case is one where the only question in issue is the question of the jurisdiction of the court below, and by rule 32 of this Court should be advanced for hearing—the case having been brought to this Court by appeal under the Act of February 25th, 1889, Chapter 236, 25 Statutes at Large, 693.

These appellees pray that the reason for this application may be taken from such statements and reasons herewith filed with the motion to dismiss and affirm.

L. T. MICHENER,
OF COUNSEL.

J. A. DUPUY,
WM. M. HALL,
Attorneys for Appellees.

Decree of the Circuit Court of Appeals.

Filed and entered June 5th, 1909.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Company, Bankrupt; Jacob Eichel, Laura Eichel, et al.,

vs.

The United States Fidelity and Guaranty Company, Riter-Conley Company, and Nicolette Lumber Company, Appellees.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Circuit Court, in this cause, be and the same is hereby reversed, with costs, and the cause is remanded to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg, with directions to dissolve the injunction granted therein and dismiss complainant's bill without prejudice in accordance with the opinion of this Court.

June 5th, 1909. J. C. PRITCHARD.

United States Circuit Court of Appeals, Fourth Circuit.

No. 812.

M. J. Bray, M. J. Bray, Trustee of the Evansville Contract Company, bankrupt; Jacob Eichel, Laura Eichel et al., Appellants,

vs.

The United States Fidelity and Guaranty Company, Riter-Conley Company, and Nicolette Lumber Company, Appellees.

Order Allowing Appeal.

On the 27th day of June, 1909, the United States Fidelity and Guaranty Company filed its petition with the Clerk of this Court, accompanied by an assignment

of errors, praying an appeal from a final decree, judgment and decision rendered in the above cause on the 5th day of June, 1909, in the United States Circuit Court of Appeals for the Fourth Circuit; and now in open court and at the same term at which said decree and decision was rendered, after consideration of said petition and assignment of errors,

It is ordered that an appeal is allowed as prayed; and a bond, with good and sufficient surety, tendered by the appellant, United States Fidelity and Guaranty Company, with condition required by law in the sum of $5,000.00, is hereby approved to operate as a supersedeas; and it is ordered that the Clerk do certify and transmit to the Supreme Court of the United States a record of the cause and of the proceedings, orders and decrees herein, together with a copy of the opinion of our Court, according to law.

J. C. PRITCHARD,
U. S. Circuit Judge.

This 14th day of July, 1909.

Bill of Complaint.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF WEST VIRGINIA.

To the Honorable Judges of the said Circuit Court:

The United States Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, having its office and principal place of business in the City of Baltimore, in the State of Maryland, and as such citizen of and a resident in the said State of Maryland, brings this, its bill, against M. J. Bray, trustee of the Evansville Contract Company, bankrupt, and Jacob

Eichel and Laura Eichel, each and all of whom are citizens of and residents in the State of Indiana, in the City of Evansville therein; the City National Bank of Evansville, Indiana; the First National Bank of Evansville, Indiana; The Citizens National Bank of Evansville, Indiana; (2) and the First National Bank of Rockport, Indiana, each and all of said banks being corporations created and existing under the laws of the United States relating to Banking Associations, and each being engaged in business, and having their place of business located in the respective towns and cities in the State of Indiana mentioned in their respective titles, being citizens of and residents in the State of Indiana; the Second National Bank of Parkersburg, West Virginia, and the Farmers & Mechanics National Bank of Parkersburg, West Virginia, the two defendants last named being corporations under the laws of the United States relating to Banking Associations, and located in the said City of Parkersburg, West Virginia, and in said District, and as such citizens of and residents in the State of West Virginia, in the Northern District of West Virginia, and the Farmers Bank of Rockport, Indiana, a corporation under the laws of Indiana, and as such a citizen of and resident in the State of Indiana, and the Riter-Conley Company, a corporation under the laws of the State of Pennsylvania, doing business in the City of Pittsburg, and as such a citizen of and resident in the State of Pennsylvania, and the Nicolette Lumber Company, a corporation under the laws of West Virginia, located and doing business in the County of Wood, in the said State of West Virginia, in said District, and as such a citizen and resident of said State and District.

Your orator complains and says:

1st. Your orator is engaged in fidelity insurance and general surety business, and prior to the year 1904 had become surety on several bonds executed unto the United States by the Evansville Contract Company, hereinafter called "Contract Company," a corporation under the laws of Indiana, for the performance of certain contracts covering improvements to be made in the Ohio, Big Sandy and Congaree Rivers, which bonds are as follows:

(a) Bond dated November 21, 1904, for the construction of Dam No. 18, Ohio River, in the penalty of ninety thousand dollars.

(3) (b) Bond dated September 19, 1903, for the construction of Dam No. 3, Ohio River, in the penalty of fifty thousand dollars.

(c) Bond dated October 2, 1902, for the construction of Dam in Congaree River, South Carolina, in the penalty of thirty thousand dollars.

(d) Bond dated November 13, 1900, for the construction of Dam in the Big Sandy River, in the penalty of thirty thousand dollars.

Each of the said bonds was conditioned as required by the Act of Congress of the United States of August 13, 1894,—28 Statutes at Large, 278—providing that any person entering into a contract with the United States for the construction or prosecution and completion of any public work * * * shall be required to execute the usual penal bond * * * with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and material in the prosecution of the work provided for in such contract; the exact con-

dition being that the Evansville Contract Company should "in all respect perform all and singular the conditions and agreements in and by the said contract agreed and covenanted by said Evansville Contract Company to be observed and performed * * * and shall promptly make full payment to all persons who supply it labor or materials in the prosecution of the work provided for in said contract." In order to procure your orator to become surety on said several bonds, the Contract Company made applications on the printed forms of your orator, in writing, and therein agreed, among other things, *to indemnify and save harmless your orator from all loss and liability and "in the event of the Contract Company being unable to complete or to carry on the aforementioned contract to assign, and does hereby assign, such plant as it may have upon said work"* unto your orator. And in the contract with the Govern-
(4) ment, made part of each bond, it was, among other things, provided: *that a certain per cent. of the money earned should be retained by the Government* until completion; that in case of *default by the Contract Company* the Government *should have the right to take possession of the work and plant and prosecute the matter to completion;* and the applications made by the Contract Company further provided that your orator *should be subrogated* to every right of the principal, and to take all the moneys to be paid by the Government, including the retained percentages in the event of any breach or default on the part of the Contract Company.

A copy of such application is shown by Exhibit "A," herewith filed. A copy of the bond covering Dam No. 18 is herewith filed, marked Exhibit "B," and the other contracts and bonds relating to the works other

than Dam No. 18 will be made part of the record as soon as the same can be obtained and produced. Your orator cannot produce the original application connected with any one of the said bonds, for the reason that the originals were destroyed in the fire in Baltimore in February, 1904; but the terms thereof are shown by Exhibit "A," which is the printed form in use when the several bonds were executed; and on each of the applications the said Contract Company signed its name and made its contract, filling up the blanks accordingly, and upon the faith and in consideration of the agreements and indemnity therein set forth, and of your orator's rights as surety under the said bonds and contracts aforesaid, your orator did become surety, and had no collateral or other security from said company.

2d. This cause presents a controversy arising under the laws of the United States, relating to Government contracts and sureties under the Act of Congress above mentioned. Your orator has a lien, hereinafter more fully set forth, upon a fund of over $27,000.00 in the hands and possession of the said M. J. Bray, trustee, and acquired by the said Bray as trustee, and this Honorable Court has jurisdiction of this cause (5) under Section 23a of the Act of Congress relating to bankruptcy; and your orator charges that it has a claim against that fund, adverse to the pretensions and claims and possession of the said trustee.

Of the funds of the said trustee, a large sum of money, to wit, twenty-six thousand dollars, is deposited in equal amounts of thirteen thousand dollars each, or about that, in the said Farmers & Mechanics National Bank of Parkersburg and in the said Second National Bank of Parkersburg, in said Northern District of West

Virginia, and within the jurisdiction of the court; and this Honorable Court has jurisdiction of this cause under Section 8 of the Act of March 3, 1875, relating to suits for the enforcement of liens and the assertion of claims and the removal of clouds upon real and personal property within any District.

Your orator further charges that M. J. Bray was on or about the 20th day of March, 1906, appointed trustee of the said Evansville Contract Company, at the said City of Parkersburg, in said District, by the District Court thereof in Bankruptcy; and that the said Contract Company was on the 27th day of February, 1904, adjudicated a bankrupt by the Honorable District Court of said Northern District of West Virginia, and this Honorable Court has jurisdiction, because the matters herein set forth are within the judicial power of the United States, and within the equity jurisdiction of the Courts of the United States.

3d. Your orator shows that by virtue of the contracts of indemnity executed to it by the said Contract Company your orator acquired a lien, by the terms thereof, upon all of the plant and property of the bankrupt at and about each of the several dams and constructions, respectively, or owned by the bankrupt as in said contract set forth. And your orator acquired a lien upon all funds and moneys earned by or received from said contracts in the hands of the Government of (6) the United States, and due or owing under the said several contracts of construction, and each of these liens was in existence at the time the said Contract Company was adjudged a bankrupt, and still continues, at least so far as may be necessary for the indemnity of your orator, for or on account of any and all liability

whatever arising upon each and all of said bonds. And your orator, from the time of the execution of each of said bonds, had, and now has, every right and remedy of the Government against the said Contract Company, and was, and is, entitled to every provision of each of those contracts, in favor of the Government, and for its protection; and so likewise, your orator had, and has, every right and remedy of the Contract Company against the Government, and every right and remedy of persons who furnished material in the prosecution of the work, and all of such rights and remedies, whether arising by direct expression of the written instruments, or arising in equitable doctrines of subrogation, are appropriate to be administered by this Honorable Court.

4th. On the 27th day of February, 1904, the Evansville Contract Company was adjudicated a bankrupt, and since that time, as shown by the record, its plant and property has been sold and disposed of under the orders of the court, the amount arising from the sales of the plant in and about Dam No. 18 being about $61,000.00, and from sale of property at other places being about $3,000.00, making a total amount arising from such sales of plant about $64,000.00, more or less, as shown by a copy of a statement or report filed by the Trustees up to December 19, 1905, as marked Exhibit "C," and the funds then on hand would amount to about $36,000.00 subject to allowances undetermined and unadjusted.

5th. The net amount now in the hands of the said trustee, Bray, and held by him, after deducting from all moneys received from the Government and the proceeds (7) of property, the allowances and charges of admin-

istration—is about $27,600.00, of which $26,000.00 is deposited in equal amounts in the said Second National Bank and Farmers & Mechanics National Bank of Parkersburg, W. Va., as above stated.

Your orator has a lien upon and a claim against that fund for whatever amounts may be recoverable by persons having right of recourse on your orator's bonds; and your orator is entitled to have that fund applied in payment of the claims of whatever persons have supplied labor and materials in the prosecution of the work covered by your orator's said bonds, subject to the payment of premiums due your orator and to some unpaid costs.

6th. The Evansville Contract Company became unable "to complete or to carry on" any of the construction contracts above mentioned; and your orator's lien had thereby fully attached to its property and to its assets at the time of the adjudication in February, 1904.

7th. After the adjudication was made in bankruptcy the creditors of the bankrupt elected the said M. J. Bray, and also C. D. Dotson and Alfred Heine, trustees; and these trustees, in March, 1904, filed their petition before the Referee, George W. Johnson, a copy of which is herewith filed as part of this bill; and upon the hearing of the matters arising on that petition, and by authority of the creditors of the Contract Company, an order was entered on the 11th day of April, 1904, a copy of which is filed marked "D," authorizing the trustees to conduct the business of the bankrupt, and to borrow money upon certificates to the amount of $75,000 issued by them and to pay the premiums accruing to sureties *on bonds given to the Government, and to perform and to complete the contracts existing between the*

Bankrupt and the United States; "to collect the contract price, and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of the contract."

(8) Your orator was the surety company referred to as the person to whom premiums should be paid, and who should be protected and saved harmless.

7th. In the petition filed by the trustees and referred to in the order of April 11, 1904, it was averred, and it had been stated and represented by Jacob Eichel, former president of the Contract Company, and by others connected with him, that large profits could be realized from the completion of the several contracts of the Government which were then in an unfinished state, and the main reliance was upon the contract regarding Dam No. 18, with a valuable plant and property owned by the Bankrupt, all situated in said District within the jurisdiction of this court, and about six miles from its Court House. The liabilities and indebtedness of the bankrupt exceeded $200,000.00, and among the creditors were banks that held no security. After learning of the collapse of the Contract Company your orator inquired prior to the making of the order of April 11th as to the probable amount owed to persons who furnished material or labor in the prosecution of the several contracts covered by said bonds, and was informed by Jacob Eichel, and by the trustees, that the amount of such indebtedness was about $40,000, and the names of some of the supposed holders of such claims were given. Up to that time your orator had no knowledge whatever of the quantity of materials purchased, or of any claim owed for material or labor, and to this day your orator does not know what claims

are just or are properly recoverable on that account; but when your orator found that the Contract Company was bankrupt, and learned that the creditors were desirous of having the contracts finished in the belief that a large profit would be realized therefrom, your orator, through its chief engineer, Charles F. Wood, expressed a willingness to allow the creditors to take charge of all the contracts and complete them and to reap the benefits to be derived therefrom, if, and only if, your orator (9) should be fully indemnified and saved harmless against all liability whatsoever to the Government, and on any claims for material or labor or other claims upon its bonds.

Your orator then claimed and now charges that when the Bankruptcy occurred your orator had the right to take charge of that work, and to take hold of the plants of the Bankrupt, and to receive the retained percentages from the Government, and thus protect itself by completing each contract; and your orator charges that it could by efficient management have fully completed every contract without loss. After some negotiations it was agreed that indemnity should be furnished to your orator by a few of the responsible creditors and that several would execute an agreement of indemnity; and under date of the 11th day of April, 1904, an agreement was signed by your orator, expressing the understanding had—that upon the delivery by said banks to your orator of a bond in the sum of $75,000.00 to indemnify your orator from all liability heretofore accrued or hereafter accruing against it, by reason of its suretyship on said four several bonds, then (your orator agreed) as follows:

First, to consent that the trustees in bankruptcy of the Contract Company should perform the contracts with the Government; Second, that the moneys in the hands of the Government accrued and accruing to be paid to the trustees; Third, that the trustees may borrow money and issue trustees' certificates therefor, and that your orator would co-operate and execute all consents necessary to facilitate the performance of the contracts; and, Fourth, that the premiums on the bonds given by your orator should be paid.

A copy of that agreement is herewith filed, marked "Exhibit E." It was made in view of the terms of the decree or order made by the Referee on that same 11th day of April, 1904. The trustees who were proposed to continue the business and to perform these contracts were strangers to your orator. They were the selected agents of the creditors, and your (10) orator had no interest whatever to subserve, except to protect itself from loss, while willing that the creditors might derive the benefits of any profit that might arise.

Prior to the 11th day of April, 1904, all these matters had been discussed, and some of the several banks, defendants herein, had authorized the giving of the contemplated bond as early as the 2nd day of April, 1904, and, accordingly, after the 11th day of April, 1904, a bond was delivered unto your orator, executed by the National Banks and the Farmers Bank of Rockport, defendants herein, in the aggregate sum of seventy-five thousand dollars, "and each of the said obligors binds itself *severally, and not for any other person*, to pay *such proportion* of said sum of seventy-five thousand dollars as the amount *of its claim or indebtedness* against the Evansville Contract Company bears to the total

aggregate of such claims or indebtedness, as shown below. Dated April 4, 1904."

That bond recites each one of the bonds given by your orator, and the bankruptcy of the Contract Company, the appointment of the trustees, and an order passed at a meeting of creditors on the petition of trustees, authorizing the trustees to conduct the business of the Contract Company and to finish the contracts theretofore undertaken by the bankrupt, and to borrow seventy-five thousand dollars on trustees' certificates, "*and whereas the undersigned creditors of said bankrupt believe it to be the interest of the creditors that such contracts be finished by said trustees, and that moneys be borrowed by the trustees, according to the decree or order of the Bankrupt Court; and the United States Fidelity & Guaranty Co.* is unwilling that that course should be taken *unless it may be indemnified against any liability that has accrued or may accrue to it* by reason of its being surety on each *of the bonds above mentioned.*

"Now, therefore, if the bond obligors shall and will in all respects indemnify and save harmless the said United States Fidelity & Guaranty Co. from all loss, cost, charge, damages and liability *heretofore accrued or hereafter accruing* against it by reason of its suretyship or liability on said bonds, and on each of them, then this obligation to be void; otherwise to remain in full force and virtue.

"The debts and liabilities referred to in this bond for *the purpose of reckoning the proportions above mentioned are as follows:*

"City National Bank of Evansville, Indiana,	$5,000
"The First Nat'l Bank of Evansville, Indiana,	24,000
"The Citizens National Bank of Evansville, Indiana,	24,000
"The Farmers & Mechanics National Bank of Parkersburg, W. Va.,	20,000
"The Second National Bank of Parkersburg, W. Va.,	25,000
"The Farmers Bank of Rockport, Indiana,	10,000
"The First National Bank of Rockport, Indiana,	7,000
	$115,000"

That bond making each bank severally liable to your orator for such proportion of seventy-five thousand dollars (amount of certificates) as the claim of each bank bore to the aggregate of their debts—was executed by each bank by the due and formal action of its Board of Directors for the purpose of protecting its own debt; and upon the faith thereof your orator allowed the trustees to take charge of all of the contracts and all of the plant and material and property of the bankrupt, and of all the funds in the hands of the Government; and your orator remained liable to the Government for the performance of the contracts and to all persons furnishing materials to the trustees.

Your orator files as part hereof copies of the order made in bankruptcy on the 11th day of April, 1904, as Exhibit "D;" the bond of said banks, dated April 4, 1904, as Exhibit (12) "F;" the agreement of your orator, dated April 11, 1904, agreeing to allow trustees to take charge and to finish the contracts and to issue certificates, etc., upon delivery to your orator of the agreement of

indemnity from the banks—Exhibit "E." And your orator charges that it accepted in good faith the said bond or indemnity agreement of the said banks, and that the same still stand in full force and virtue, and that your orator has complied with everything on its part agreed to be done and performed with regard thereto; and these several agreements were made and delivered at the said City of Parkersburg, W. Va., in said District.

8th. After the order of April, 1904, and your orator's agreement of that date, and after the delivery of the said indemnity agreement dated April 4, 1904, became effective, the said trustees did issue certificates for a large amount, and in the course of time they performed and completed the several contracts with the Government of the United States. Many thousands of dollars were realized and received by the trustees under the contracts had with the Government. Your orator did not then know and cannot now state what are the names of the persons, nor the amounts of the claims which have right of action against the bonds given by your orator unto the Government and above specified. Your orator felt entirely secure and relied absolutely upon the indemnity furnished by the said banks—each of which proved its claim as a creditor before the Referee in bankruptcy, and upon the honesty and integrity of the trustees to protect the interests of all concerned, and especially upon said Bray, who was represented to be of highest probity and character. Your orator had no knowledge or notice of any fraud or bad faith on the part of any of the defendants herein named until long after the giving of the bonds and the making of arrangements for your orator's indemnity and after the work on the Government contracts were completed.

9th. By the order of April 11th, 1904, the trustees were, among other matters, authorized to and did employ Jacob (13) Eichel, president and general manager of the bankrupt, at five hundred dollars per month and expenses, to assist the trustees in looking after the interests of creditors; and before your orator agreed to consent that the trustees should complete said contracts, and prior to making any agreement whatsoever with the banks or others on that subject, the said Jacob Eichel assured your orator, through its representative, Mr. Wood, that the completion of the Government contracts would realize far more than sufficient to pay off all of what were termed preferred debts, and also realize a large sum to be distributed to general creditors; that Eichel himself was very largely interested in completing the works and paying off the creditors; and that if your orator would consent to any arrangement by which the trustees could proceed with the performance of the contracts and give a first lien on the property for receiver's certificates, then he, Eichel, would proceed at once to get control of all claims of the class or character having recourse on your orator's bonds; and that he would guarantee that your orator would have no trouble or question with regard to any such claims; and that no demand should be made against your orator on that account. By preferred claims, Eichel meant all of those claims which were entitled to be paid in preference to any other claims, and were just such as would have a right of recourse on your orator's several bonds for material and labor furnished.

Your orator trusted to these reliances and assurances of the said Eichel as one consideration in agreeing

to accept the indemnity from the banks and the making of the arrangements hereinabove shown.

10th. The books and papers of the bankrupt were in the charge and possession of the trustees. Your orators believed that they were honest and advised by competent and honorable counsel; that they would not knowingly permit the allowance of a claim that was unjust, especially as the assertion of an unjust claim is made criminal by Section.....of (14) the Bankrupt Law; and your orator had no suspicion that the trustees or their counsel or their salaried assistant, Eichel, would seek to defraud the creditors or your orator in any particular.

But some time about the 19th day of November, 1904, the trustees upon a suggestion that it was desirable to ascertain what were the preferred debts having right to first payment out of the funds of the bankrupt estate—procured a showing before the Referee and an adjudication under the date of November 19, 1904, adjudicating, among other things, upon the testimony of Jacob Eichel and Alfred Heine, "that the following claims are preferred claims in this bankruptcy, and are so established in this decree as claims of that character," as shown by the last clause of said decree, herewith filed as Exhibit "G." Those claims, amounting to about $40,000, correspond in a general way with what your orator had been told was due to material and labor claims; but your orator did not discover until the 5th day of September, 1907, that substantially all of those claims, with the exception of those held by the Riter-Conley Company and the Nicollete Lumber Company, had been bought up at a discount—some of them as low as fifty per cent—and the aggregate averaging a cost of

less than eighty per cent—by Philip W. Frey, the general counsel of the trustees in bankruptcy, in conjunction with M. J. Bray, trustee, and Jacob Eichel; and that the said counsel and the said trustee, in further collusion and conspiracy and in violation of their fiduciary and trust relations, had acquired these claims, and had been instrumental in fixing the same as entitled to first payment out of the assets of the bankrupt, and as belonging to the class having right of action on your orator's bonds, against which the said banks had guaranteed your orator against loss; and your orator then also for the first time discovered that under date of December 12, 1904, the said P. W. Frey, in writing addressed to the said M. J. Bray, trustee, recited that (15) the said Frey was owner of all those claims; that Bray was interested therein; that one-half the profit thereon was $4,500.00, and directing Bray to pay one-half of said profit to the said City National Bank of Evansville, as shown by a copy of said paper herewith filed, marked Exhibit "H;" that said paper refers to this adjudication made by the Referee on the 19th day of November, 1904, and recites, as the truth is, that whatever claims have right of recourse on your orator's bonds *are entitled to first payment out of the funds* in the hands of the trustees. Your orator also learned in September, 1907, from the statements of Bray and others, and from documents of which copies are herewith filed as exhibits, that shortly after the bankruptcy of the Contract Company the claims listed in the said paper of December 12, 1904, were acquired by the said Frey in the manner following: Drafts were made on the said P. W. Frey for the amount agreed to be paid for these several claims; said drafts were

generally made by the said Jacob Eichel with the claim attached. The amount of the draft was paid by the said City National Bank, and then the amounts so advanced by the bank were covered by the notes executed jointly by the said Frey and M. J. Bray, trustee of the bankrupt, and said Bray kept an account thereof on his books under title of "Frey Accounts." These notes were finally taken up by the said M. J. Bray; and afterwards, under the false and fraudulent pretense that Laura Eichel was the owner of such claims, the said Frey assigned the same unto the said Laura Eichel under the date of November 30, 1906, and said assignments were thereafter filed before the Referee, but the date of such filing does not appear. After that, and about the 1st and 2d days of March, 1907, suits were brought on these several claims in the court of Common Pleas of Allegheny County, Pennsylvania, at Pittsburg, for the use of the said Laura Eichel, as shown by a list of said suits herewith filed, marked Exhibit "I." Your orator did not know, even at the (16) time of bringing such suits, that any such claims were in themselves fraudulent and unjust, or that the said M. J. Bray or the said Philip W. Frey had any interest therein.

Your orator then supposed that Jacob Eichel alone was so interested, and was using his wife's name as a mask for his own interest.

Your orator did not discover until September 5, 1907, that under date of December 31, 1906, papers had been executed between the said Laura Eichel and the said M. J. Bray, as follows:

First. A note for $27,037.39, at three per cent interest, was executed by Laura Eichel and her husband

to said Bray, marked "K." No part of that note has been paid, and no one except Bray paid for the claims.

Second. A contract between Laura Eichel and M. J. Bray of that same date recited that Laura Eichel had bought "the following claims for material against the Evansville Contract Co." (listing the names of the claimants, the fact of the claims and the amounts paid therefor), showing the par value of $35,663.82, for which was paid $27,037.39. That paper agrees that Bray, having furnished the money to buy these claims, and he holding Laura's note for $27,037.39—therefore all of the said claims which were then in the hands of Messrs. Hall & Metcalf, the attorneys in Pittsburg, with whom said claims had been entrusted for collection, shall be held by the *said Bray, who was to receive all the money collected from said claims*, and after the note is fully paid he is to retain as his share of the interest and profits of this transaction one-half of all the money received by him over and above the note, marked "L."

Third. An order in writing, signed by Laura Eichel, directing Messrs. Hall & Metcalf to pay to M. J. Bray the proceeds of all claims aforesaid, marked "M."

Your orator charges that the buying of said claims was a violation of the trusts and duties of the said Eichel and (17) of the said P. W. Frey and of the said M. J. Bray, trustee; that the name of Laura Eichel was used as a mere mask and cover for the real parties to the fraud on the bankrupt's estate, and upon your orator; that M. J. Bray is the real owner of said claims; that he has caused the same to be prosecuted in the City of Pittsburg against your orator, and in fraud of your orator's rights and in violation of equity, conscience and good faith; that some of said claims are unjust as labor or

material claims; that your orator has not been able so far to ascertain the facts as to many of them; that the claim in the name of the Clydesdale Stone Co. for $6,185.33 appears to have been purchased for the amount of $3,606.30 by a draft drawn by Jacob Eichel on the said P. W. Frey, and your orator charges that a large part of the said claims covers material that was not furnished in the prosecution of any Government contract on which your orator was at any time liable, and the claim of the Monongahela River Coal & Coke Co. for $4,592.98, purchased at fifty per cent discount, is not for material or labor furnished in the prosecution of any contract in regard to which your orator was surety, being in large part at least only for coal alleged to have been purchased by the bankrupt.

After these suits against your orator were brought in Pittsburg in the Court of Common Pleas, in March, 1907, your orator interposed defenses, and in an effort to ascertain at Evansville whether the indemnifying banks of that city could effect an adjustment of all matters in controversy, your orator on April 13, 1907, learned that M. J. Bray had some interest in the claims, and the documents and the proofs with regard thereto were obtained in the course of depositions given by Bray and others on September 5, 1907, at Evansville, Indiana.

11th. By the 19th day of December, 1905, the trustees in bankruptcy had completed all of the contracts and filed a report before the Referee, showing that before that time the (18) amounts received from the Government and from the sale of plant and property, after deducting disbursements, left the sum of $36,602.96, subject to allowances and costs of administration yet un-

determined; and that the operations of the trustees had not resulted in a profit, and that the funds in the hands of the estate would not pay the claims that had been decreed entitled to first satisfaction; and up to about that time your orator had been constantly assured by the trustees, and especially by the said trustee Bray, that all of the claims of persons for material or labor having recourse on your orator's bonds would be paid; and that the money in the hands of the trustees after paying allowances and operating expenses would at once be applied for that purpose; but your orator found that no such appropriation was being made; and about that time the attitude of the trustees changed, and it became apparent that there was a purpose to deprive your orator of the right to apply that fund for its relief, or to pay such material claims; and on or about the 12th day of February, 1905, your orator filed a petition before the said Referee in Bankruptcy, setting up the several proceedings and asserting its right to have the funds in the hands of the trustees applied to the payment of such claims as had recourse against your orator, under the said Acts of Congress, and the bonds given pursuant thereto. Your orator in said petition charged its liens upon the funds and its rights to be exonerated, and that the several indemnitor banks are interested, and prayed that the rights and liens of your orator should be enforced upon the funds in the hands of the trustees; that the court would ascertain what persons are entitled to enforce any liability upon any of your orator's bonds; and that the funds in the hands of the court be applied to the satisfaction of such claims when ascertained, and making the trustees and indemnitor banks parties; all

of which appears by a copy of said petition herewith filed, as Exhibit "N."

(19) 12th. Notice was given to the trustees and to each of said banks upon that petition, but no one of said banks has at any time appeared thereto, or in any manner assisted your orator in seeking to protect themselves against the liability.

A demurrer on the part of the trustees to that petition was overruled. About March 1, 1906, Alfred Heine died, and the surviving trustees resigned. On March 20, 1906, the said Bray was appointed sole trustee, and still remains such, and now holds the present fund of the said bankrupt estate.

An answer was filed by Bray to your orator's petition, on which issue was poined and depositions were taken, and the questions arising thereon are still pending and undecided before the Referee.

On the 12th day of February, 1906, upon the petition of one J. G. Eigenman, the Referee passed an order instructing the trustees to file the necessary pleadings "*to raise the question* as to whether or not the claims heretofore allowed as preferred are properly preferred claims, and for the re-examination and consideration thereof," and that the trustees file such pleadings by February 19, 1906.

On March 1, 1906, the trustees filed a petition setting out the creditors whose claims had been preferred, reciting that Eigenman had asked for a rehearing, and stating that they had called on Eigenman's attorney to state grounds for rehearing, and reported that the grounds were:

1st. That the claims were not properly proved.

2d. They should not be allowed until proved.

3d. That the claims are not preferred and are not liens upon any property or proceeds.

4th. That the preference was not based on proper evidence.

Wherefore they prayed that the matter might be re-heard.

A copy of that petition is herewith filed, marked "O." Nothing was ever done under it.

(20) On September 11, 1906, J. G. Eigenman withdrew all appearance in the case, and asked to be excused from further proceeding, as shown by Exhibit "P."

Up to this present date there is not anywhere a suggestion on the part of any one of said trustees that the claims ought not to be allowed on the ground that the same are unjust, or on the ground that the same do not represent material or labor furnished in the prosecution of one of the contracts, or that the same cannot be allowed, for the reason *that the parties holding the same perpetrated a fraud on the creditors and were guilty* of breaches of trust in buying the same, nor do they allege or show that any part of such claims were purchased at fifty cents on the dollar, or that M. J. Bray, one of the trustees, together with Jacob Eichel, a high-salaried fiduciary, and P. W. Frey, the counsel for the trustees, participated in any frauds upon the court and used their position to establish such claims against the bankrupt's estate and against your orator's liability, in fraud of their duty and against conscience. No evidence was ever taken on the subject, and the said Bray and Eichel and Frey fraudulently concealed the facts known to them, and especially concealed the breaches of trust and the fact that they had been speculating and buying up such claims at a discount, and they had been

using their position in fraud of the fiduciary relations in which they stood. Your orator charges that no effort has ever been made in good faith by the trustees to go into the facts regarding such claims; to disprove them or any one of them; to challenge the fairness thereof, or to relieve the estate therefrom, except that when they found it was to their pecuniary interest to appropriate on the claims of general creditors, held by them, the funds in the hands of the court, *they have sought to maintain the amount* of the claims at their full face value, and to enforce them against your orator, who, until very recently, had no intimation that the same were unjust charges against your orator.

(21) 13th. In August, 1907, the suits that had been instituted in the Court of Common Pleas remained pending and new actions were brought on these identical claims under the respective styles as follows:

United States of America, for use of (Here giving the name of the original plaintiff or holder of claim) Philip W. Frey, and now for use of Laura Eichel,

vs.

United States Fidelity & Guaranty Company, a corporation.

Nos. 24 and 25, upon the claim of the Clydesdale Stone Company for material furnished and work done on Dams Nos. 3 and 5. (These cases were first brought in the Federal Court.)

The following claims were sued upon under the title above mentioned in the Circuit Court of the United

States for the Western District of Pennsylvania, at Pittsburg, after having been first sued in the Common Pleas Court:

No. 42, Southeastern Lime and Cement Co., Dam in Congaree River.

No. 44, Lombard Iron Works, Congaree River.

No. 45, Pittsburg Trolley Pole Co., same dam.

No. 43, E. L. Neal, Dam No. 18, Ohio River.

No. 46, C. D. Dotson, Dam No. 18.

No. 48, C. C. Martin & Co., Dam No. 18.

No. 49, Nicola Bros. Co., Dam No. 18.

No. 51, L. Cramer & Son, Dam No. 18.

No. 53, Parkersburg Mill Company, Dam No. 18.

No. 55, Monongahela River Consol. Co., Dam No. 18.

No. 57, Withers & Vandevander, Dam No. 18.

No. 47, Clydesdale Stone Co., Dam No. 3, Ohio River.

(22) No. 50, Duncan & Porter Co., Dam No. 3.

No. 52, Monongahela River Consol. Co., Dam No. 3.

No. 54, E. L. Olens, Dam No. 3.

No. 56, J. H. Webster Variety Iron Works, Dam No. 3. And the same are now there pending, as shown by Exhibit "Q," which will be supplemented by judicial record, if required by the court.

Laura Eichel, for whose said pretended use said suits are being prosecuted, is the wife of said Jacob Eichel, and your orator charges that all of said suits have been brought, not for the use and benefit of the said Laura, but for the use and benefit and by the instigation of the said Bray, in fraud of your orator's rights, and for the purpose of harassing and oppressing your orator, of multiplying suits and proceedings, and to avoid the ap-

plication of the primary fund, which is in the hands of said Bray in the jurisdiction of this Honorable Court, where all of the transactions occurred, where Dam No. 18 is located, and over sixty thousand dollars was realized from plant there situated, and the claims aforesaid are most largely for materials furnished for said dam.

The said Bray and the said Eichel have gathered unto themselves control of most all of the claims against the bankrupt's estate—they control the trusteeship and the right and the authority to take proceedings in bankruptcy, to expose and to redress frauds on the funds; they have corrupt interests to subserve in fraud of your orator and other creditors; they have interfered with your orator's indemnitors, stirring trouble and creating embarrassments for your orator; and your orator charges that this Honorable Court should enjoin all of the above mentioned actions, and all proceedings against your orator for the collection of any of the claims held by the said Bray or Eichel or any of the defendants, and should adjust all the claims and equities of all parties concerned, and this is the only court that can afford full, adequate and complete (23) relief in the premises, ascertaining what amount should be paid to each, and by whom, and enabling your orator to ascertain its liability, and to have the same satisfied out of the funds properly applicable, and by the indemnitors under their contract.

14th. The said Bray and Eichel have entered into a scheme and conspiracy to not only deprive your orator of its right to apply the funds in the trustee's hands to the payment of just claims for material, but it is a part of their scheme to compel your orator to pay claims that are unjust, and to divert the fund to the payment

of the many unsecured claims in which the said Bray and the said Eichel are interested.

15th. After your orator had accepted the indemnity bond of the defendant banks, the said Farmers & Mechanics National Bank and the Second National Bank of Parkersburg sold their respective claims of $20,000.00 and $25,000.00 to the said Jacob Eichel at a large percentage of their face, and made assignments thereof, at a time when such sales were made possible by reason of the profits expected to accrue from your orator's permitting the performance of the Government contracts. The said Eichel likewise acquired in his own name, or in that of his wife, the claims of all the other indemnitor banks who executed the bond of April 4, 1904; that is to say, the said Jacob Eichel was assignee in 1906 of the claims of the Citizens National Bank, of the First National Bank, and of the City National Bank, of Evansville, and his wife, Laura, was the pretended owner of claims of the Farmers Bank of Rockport and the First National Bank of Rockport, the claims of the two banks last named having been prior to January 31, 1905, assigned to the said Philip W. Frey, counsel for the trustees, as shown by his statements herewith exhibited, marked "R" and "S."

The said Laura and Jacob Eichel appeared, by power of attorney filed with the Referee and dated December 1, 1906, to claim substantially all of the indebtedness of the bankrupt, (24) excepting that of the Riter-Conley Company and of the Nicolette Lumber Co., as shown by Exhibit "T."

16th. The said Jacob Eichel was adjudged bankrupt on the.....day of September, 1904, and was discharged on the.....day of February, 1905, in the

District Court of the United States for the..... District of Indiana, as shown by Exhibit "U."

17th. Of the obligor banks, the First National Bank of Evansville is in liquidation, and its remaining assets are being distributed as fast as five per cent is realized, so that the security of your orator is thereby endangered, and the said Jacob Eichel, bankrupt, has agreed to indemnify the said First National Bank and the said Citizens National Bank, representing $48,000.00 of the $115,00.00, as shown by Exhibit dated November 3, 1906, herewith filed, marked "V." The said M. J. Bray has contracted to indemnify the First National Bank of Evansville against all liability on said bond, as shown by a copy of said contract herewith filed, marked "W;" and your orator is informed, believes and charges that all of the other obligor banks, except the Second National Bank and the Farmers & Mechanics National Bank of Parkersburg, have also been in some way indemnified against such liability by the said Jacob Eichel, or by the said M. J. Bray, or by the said Laura Eichel, or by some one or more on their behalf; and your orator is informed, believes and charges that the said Parkersburg banks pretend that they propose to escape such liability on the ground that they had no power to make this contract for their benefit, on the strength of which they realized largely on their respective claims.

18th. Each of the said defendant banks is bound by the contract of April 4, 1904. Your orator accepted the same in good faith, relied thereon in making the agreements shown; no bank became bound in excess of the amount of its own direct debt; each bank had the full benefit of the contract. (25) Your orator could

fully have saved itself from all loss or liability if it had not yielded to importunities that the trustees be permitted to fulfill the contracts. Each of the said banks had the benefit of their contract, and each of them is bound and estopped to deny his proportionate liability according to the terms thereof. All of the certificates issued by the trustees have been paid in full. The net funds now in the hands of the trustees, after payment of premiums due your orator and some unadjusted costs, should be first applied to the satisfaction of whatever are just claims having right of recourse against your orator as surety on said bonds; such was the understanding of the creditors and of the trustee, and of all parties concerned when said decree of April 11, 1904, was entered; that such has always been, and still is, known to be the understanding, and according to the true purpose and intent of the parties and the contracts executed by them. Bray and Frey and Eichel actually purchased material claims because of that understanding, and at a time when they intended that the same would be paid first and in preference to all others. There is no other claim or lien against said fund, except for the payment of premiums owed to your orator for the liability on those bonds, which has continued to this date.

19th. Your orator charges that an accounting should be had, and the court should ascertain what claims are proper charges for material furnished under said contracts, according to the Act of Congress and the laws of the United States in such cases made and provided; that of the claims mentioned in the assignments and contract between said Bray and Laura Eichel, none should be allowed in excess of the amount actually due

thereon, and actually paid therefor in either case; that a discount made on any claims shall be eliminated in its allowance; that each one of the said defendant banks is interested in the application of the funds in the hands of the trustee to the satisfaction of said claims; that without the interference of (26) this Honorable Court litigation and controversy with regard to the subject matter of this bill would result in a multiplicity of suits and in a grievous wrong and hardship to your orator; that the Honorable District Court in Bankruptcy has not settled and adjusted any such matter and has no jurisdiction or means to apply the requisite remedies by administering complete justice in one comprehensive suit; and your orator is remediless without intervention of this court.

Your orator has applied to the said District Court for permission to file this bill, and such permission and leave has been given, as shown by its order in that behalf.

Wherefore, your orator prays that the persons named in the caption of this bill may be made parties thereto, and be made to answer the same; but oath is hereby waived to any answer that may be filed by any such defendant; that Your Honors will decree that the fund in the hands of the said trustee, and now deposited in the Second National Bank of Parkersburg, and in the Farmers & Mechanics National Bank of Parkersburg, is subject to a lien for the payment of all claims and debts for material, and that the net amount thereof, after paying premiums due your orator, and costs of administration, shall be applied to whatever are just and proper debts owed by the bankrupt for materials and labor supplied within the meaning of the said Act

of Congress, and within the terms of your orator's bond.

That the court will decree:

That no claim held by the said M. J. Bray or by the said Jacob Eichel or by the said Laura Eichel, or by any agent or servant or attorney of them, shall be paid in an amount in excess of the sum actually expended therefor.

That due and proper proceedings may be had upon such notice or process as the court may prescribe for ascertaining the several amounts due for material and labor furnished under each and every one of the bonds aforesaid given by your orator; and that the liability of your orator on each bond be fixed; (27) that the court will apportion said liability as to each party in interest; that the court will decree that each one of the defendants banks herein is bound and liable according to the terms of the said agreement of April 4, 1904; and that your orator is entitled to have the same enforced; that the court will apportion and fix against the Second National Bank of Parkersburg, and the Farmers & Mechanics National Bank of Parkersburg, now within the District of this court, and against each of the other banks, parties to said agreement, the amount for which each is severally liable, and decree the payment of the same.

And the further prayer of your orator is that the court will take full jurisdiction of all of the persons and of the parties hereto and administer complete justice between them; and that Your Honor will graciously grant your writ of injunction in due and orderly form, directed against the said Jacob Eichel and M. J. Bray and Laura Eichel, and enjoin and inhibit and restrain them and each of them from instituting, prosecuting or

maintaining any action or suits hereinabove mentioned pending in the said State or District of Pennsylvania, and from instituting any other action or actions against your orator on account of any claim or claims arising out of its suretyship on any bond or bonds given by your orator as aforesaid as surety for the Evansville Contract Company; and that it be adjudged and decreed that your orator is entitled to be relieved from all liability on its said bonds by the application of the funds in the hands of the trustee, and by the parties to the said contract of indemnity of April 4, 1904; and that your orator is entitled to all the rights and remedies that the parties hereto, or any of them, have against each other for indemnity or contribution.

And the further prayer of your orator is that the court may grant such other and general relief in the premises as (28) in equity may be deemed just, and as the nature of the case may require.

UNITED STATES FIDELITY & GUARANTY CO.
By B. M. AMBLER, Counsel.

B. M. AMBLER, Attorney.

UNITED STATES OF AMERICA,
Northern District of W. Va.,
State of W. Va. } *ss:*

This day personally appeared before me, the undersigned authority of said county, Charles F. Wood, who, being by me first duly sworn, upon his oath says that he is Chief Engineer of the United States Fidelity & Guaranty Company, whose name is signed as plaintiff to the foregoing bill; that he is authorized to make this affidavit; that he has read the said bill, and that the

facts and allegations therein contained, so far as stated upon his knowledge, are true, and so far as stated upon information, he believes the same to be true.

CHARLES F. WOOD.

Sworn to and subscribed before me this 21st day of September, 1907.

Given under my hand and official seal.

[Seal] S. R. HARRISON,
Clerk Ct. Ct. U. S. N. D. W. Va.

Demurrer of Laura Eichel.

(Filed October 31, 1907.)

At a Circuit Court of the United States for the Northern District of West Virginia, held at Parkersburg, September 21st, 1907, at Chambers.

United States Fidelity and Guaranty Company *vs.* M. J. Bray, Trustee of the Evansville Contract Company, Jacob Eichel and Laura Eichel, The City National Bank of Evansville, Indiana, First National Bank of Evansville, Indiana, Citizens National Bank of Evansville, Indiana, First National Bank of Rockport, Indiana, Second National Bank of Parkersburg, West Virginia, The Farmers & Mechanics National Bank of Parkersburg, West Virginia, Farmers Bank of Rockport, Indiana, The Riter-Conley Company, and Nicolette Lumber Company.	In Equity.

And now, Oct. 31, 1907, comes Laura Eichel, by her attorney, William M. Hall, and demurs to the bill filed in this case for the following reasons, this defendant appearing specially to raise this question of jurisdiction and not generally:

First. The court has no jurisdiction to entertain such bill against this defendant, because she is a resident of the state of (108) Indiana and is not within the district of this court.

Second. The bill in this case does not disclose or set up any legal or equitable lien upon any property, real or personal, within the district of this court.

Third. The matters in litigation as shown by the bill are involved in suits in other United States Courts and other State Courts, brought before the filing of this bill.

LAURA EICHEL.

I, William M. Hall, attorney for the above named defendant, do certify that, in my opinion, the above demurrer is well founded in point of law.

W. M. HALL.

UNITED STATES OF AMERICA,
State of Indiana,
County of Vanderburgh, } ss:

Laura Eichel, being duly sworn, says that the above demurrer is not interposed for delay.

LAURA EICHEL.

Sworn to and subscribed before me this 29th day of October, A. D., 1907.

ADOLPH F. DECKER,
Notary Public.

[Notarial Seal]

My commission expires August 6, 1910.

(Demurrers in the same language were filed by J. Eichel, and the Indiana banks and substantially the same by Bray.)

We desire to add to our Brief the point that, as appears from the Bill in this case (1) (see bottom of page 21 and top of page 22 of the printed Bill in our Motion), the amount in the court in bankruptcy is twenty-seven thousand six hundred dollars ($27,600), and (2) (as appears on page 30 of said Bill) the claims upon which Laura Eichel sued amount to about forty thousand dollars ($40,000). It, therefore, is apparent, that even if there were a fund of twenty-seven thousand dollars ($27,000) in the Northern District of West Virginia, Laura Eichel would still have claims aggregating upwards of thirteen thousand dollars ($13,000) against the appellant in this case. She would, therefore, have a right to proceed upon her suits for all that she claims above this fund of twenty-seven thousand dollars ($27,000), and the rule would apply that the pendency in the state court of an action in personam which involves no claim to or lien upon specific property in the possession of or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it. Stanton vs. Embry, 93 U. S. 548, 554, 23 L. Ed. 983; Standley vs. Roberts, 59 Fed. 836, 844, 8 C. C. A. 305, 314; Barber Asphalt Paving Co. vs. Morris, 66 C. C. A. 55, 58, 132 Fed 945, 948, 67 L. R. A. 761; Merritt vs. Barge Co., 79 Fed. 228, 233, 24 C. C. A. 530, 535; Green vs. Underwood, 86 Fed. 427, 429, 30 C. C. A. 162, 164; Hughes vs. Green, 28 C. C. A. 537, 539, 84 Fed. 833, 835; Hubinger vs. Central Trust Co., 36 C. C. A. 494, 496, 94 Fed. 788, 790; City of Ogden vs. Weaver, 108 Fed. 564, 568, 47 C. C. A. 485, 492; B. & O. Ry. Co. vs. Wabash R. Co, 57 C. C. A. 322, 324, 119 Fed. 678, 680; Ball vs. Tompkins (C. C.), 41 Fed. 486, 490; Guardian Trust Co. vs. Kansas City

Southern Ry. Co., 76 C. C. A. 615, 618, 146 Fed. 337, 340.

This rule was applied recently by the Circuit Court of Appeals of the Eighth Circuit, in the case of Guardian Trust Company vs. Kansas City Southern Ry. Company, 171 Fed. Rep. 43.

Another way of stating the situation in the case at bar is that the power of the circuit court under the eighth section of the Act of 1875 relating to liens on property is not denied, but it is contended that there is no property within the district upon which the circuit court has, under said Act, power to adjudicate, and therefore the complainants have not by their Bill made out a case properly cognizable in the circuit court. Blythe vs Hinckley, 173 U. S. 501; Building Association vs. Price, 169 U. S. 45; Smith vs. McKay, 161 U. S. 355. Or, to put the matter in another light, where it does not appear from any facts stated that there is a disputed construction of the law of the United States under which the complainant claims, and the contest is about the facts only, the Federal question in not presented: Austin vs. Gagin, 39 Fed. 626; Theurkrauf vs. Ireland, 27 Fed. 769; Murray vs. Bluebird Mining Company, 45 Fed. 385; California Oil Company vs. Miller, 96 Fed. 17.

WM. M. HALL,
J. A. DUPUY,
Moving for Appellees.

L. T. MICHENER,
OF COUNSEL.

Office Supreme Court, U. S.
FILED.
DEC 11 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 111

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant.

VS.

M. J. BRAY, M. J. BRAY, TRUSTEE OF THE EVANSVILLE CONTRACT COMPANY, BANKRUPT; JACOB EICHEL, LAURA EICHEL, ET ALS., Appellees.

BRIEF OF V. B. ARCHER, COUNSEL FOR SECOND NATIONAL BANK OF PARKERSBURG, AND FARMERS & MECHANICS NATIONAL BANK OF PARKERSBURG, APPELLEES.

NUMBER 111

IN THE

Supreme Court of the United States

UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant,

vs.

M. J. BRAY, ET ALS., Appellees.

BRIEF OF V. B. ARCHER, Counsel for West Virginia Banks, Appellants.

STATEMENT OF THE CASE.

On September 21, 1907, the United States Fidelity and Guaranty Company filed in the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg, its bill in equity against M. J. Bray, Trustee in Bankruptcy of the Evansville Contract Company, Bankrupt, Farmers & Mechanics National Bank of Parkersburg, West Virginia, Second National Bank of Parkersburg, West Virginia, and numerous other persons, firms and corporations, which bill will be found in the record, pages 1-61, inclusive.

The objects of the bill are so numerous as to practically preclude the pleader from enumerating them in a brief under the rules of this court requiring a concise abstract or statement of the case. The exhibits, alone, exhaust the alphabet, except the letters X, Y, Z.

It is made to appear, however, by this bill and its numerous exhibits that at the date of the institution of this suit, the status of the case was as follows:

(1) On February 27, 1904, the Evansville Contract Company was adjudicated a bankrupt by the United States District Court for the Northern District of West Virginia.

(2) On December 19, 1905, there was in the hands of M. J. Bray, the Trustee of the Bankrupt, a fund aggregating practically $36,000.

(3) After the adjudication, to-wit, April 11, 1904, an order was entered by the Referee in said bankruptcy proceeding authorizing the trustees to continue the business of the bankrupt. (See exhibit D, record, page 27)

(4) On April 11, 1904, a unilateral contract was made by the United States Fidelity & Guaranty Company, plaintiff in this bill, providing for the delivery to said Guaranty Company by the various Banks mentioned in the caption of said contract, a certain bond for the purpose of indemnifying said Guaranty Company from loss, charge, damage and liability heretofore accrued or hereafter accuring against it by reason of *its suretyship or liability on four several bonds executed by the Evans-*

ville Contract Company to the Government of the United States, or to its proper officers, on which said plaintiff was surety. (See Exhibit E with bill, record page 26.)

(5) On April 4, 1904, the pretended bond of the several Banks made defendants to this bill, is claimed to have been executed and delivered to the plaintiff. This bond recites that the Evansville Contract Company had entered into four several contracts with the Government of the United States, and for the faithful performance of which contracts said Evansville Contract Company had given bonds upon which the plaintiff was surety; and that after work had been commenced under each of said several contracts, and partially completed, an order was made in the District Court of the United States for the Northern District of West Virginia, on the 27th day of February, 1904, adjudging said Evansville Contract Compaany a bankrupt; and further reciting that on March 15, 1904, M. J. Bray, Alfred Heine, and C. D. Dotson were appointed trustees of the bankrupt; that at a meeting of the creditors of said bankrupt, on petition of the trustees, it was ordered that the trustees should be authorized to conduct the business of the Evansville Contract Company to finish the contracts theretofore undertaken by the bankrupt, and to borrow money in the sum of not exceeding $75,000; that defendant Banks executed a pretended Indemnity Bond, with the following specific recital:

"Whereas, the undersigned creditors of said bankrupt believe it to be to the best interests of the creditors that such contract be finished by said trustees, and that moneys be borrowed by the trustees according to the order or decree of the Bankrupt Court, and the United States Fidelity and Guaranty Company is unwilling that

that course should be taken unless it be indemnified against any liability that has accrued or may accrue, to it by reason of its being a surety of each of the bonds above mentioned."

Then follows the specific condition of the bond, so-called, which is as follows:

"Now therefore, if the above bound obligors shall and will in all respects indemnify and save harmless the said United States Fidelity and Guaranty Company from all loss, charge, damage, and liability heretofore accrued, or hereafter accruing, against it by reason of its suretyship or liability, on said bonds, and on each of them, then this obligation to be void; otherwise, to remain in full force and virtue."

(See Exhibit F with bill, record, 27,28, 29.)

(6) The bill alleges (record, page 12, paragraph 11) that on or about the 12th day of February, 1905, the plaintiff filed a petition before the Referee in said Bankruptcy proceeding, wherein it asserted its right to have the funds in the hands of the Trustee applied to the payment of such claims as had recourse against the plaintiff, under the Acts of Congress, and the several bonds given in pursuance thereto. This petition will be found in the record beginning at page 44, and extending to and including page 49. To this petition were made defendants the trustees of the bankrupt estate and the several Banks sought to be made liable by the bill in this cause. This petition claims the funds in the hands of the Trustee in Bankruptcy, and asserts a prior lien against the same. (See Exhibit N, with the bill, record 44).

On September 21, 1907, the bill in this cause was filed and a restraining order was entered. (Record, 63.)

Numerous demurrers and motions to dismiss were by the defendants filed in this cause. The demurrer of the Second National Bank of Parkersburg, will be found in the record, page 80, and the demurrer of the Farmers & Mechanics National Bank will be found in the record, page 83.

A decree submitting the cause upon the demurrers was entered on November 20, 1907. (Record, 85.)

On January 18, 1908, a decree was entered in this cause upon the motions and demurrers theretofore filed, the court by said decree overruling all the motions and demurrers, and also overruling the motion to dissolve and vacate the restraining order, refusing to dismiss the bill, and awarding an injunction. (Record 190, 191). From this decree refusing to vacate the restraining order and awarding the injunction, an appeal was taken. (Record, 195-201, inc.)

On June 3, 1909, the Circuit Court of Appeals, upon final hearing entered a decree dismissing the plaintiff's bill. *Bray, et als. v. United States Fidelity & Guaranty Co.*, 170 Fed. 689; 96 C. C. A. 9. The opinion will be found in the record, 206-219, inclusive. From the decree of the Circuit Court of Appeals dismissing the plaintiff's bill this appeal was allowed. (For petition and assignments of error, see Record 220-223, inclusive.)

QUESTIONS INVOLVED

The questions involved upon the consideration of this appeal necessarily must be the sufficiency of the bill on its face, including the right of the plaintiff to maintain its bill in the United States Circuit Court for the Northern District of West Virginia, upon the various theories therein contained, and upon the showing made by the bill and its exhibits, which clearly demonstrate that the following facts, questions of law, and conditions, are heredirectly involved:

First.—It is made to appear upon the face of the bill that the Evansville Contract Company is a bankrupt; that the plaintiff was a surety on contract bonds heretofore executed by the bankrupt company for the faithful performance of contracts for government work.

Second.—That after the Evansville Contract Company was adjudged a bankrupt, proceedings were taken before the Referee in the Bankruptcy cause, and an order was entered on April 11, 1904, providing for the completion of certain contracts by the trustees, and authorizing the trustees to borrow upon trustees certificates a sum not in excess of $75,000; that the plaintiff made a voluntary, unilateral contract, consenting to this course, and providing for an indemnity bond from certain Banks, including the two at Parkersburg, West Virginia. But the Bankruptcy Court did not in any way make the said contract or bond a part of the record or in any manner refer thereto.

This pretended bond having been executed, not in

pursuance to any order of the Court of Bankruptcy, one of the objects of the bill in this cause is to enforce in equity the provisions of this bond against the National Banks, and to recover whatever amount the Guaranty Company may be required to pay the creditors of the Evansville Contract Company. The question therefore, of the validity of this bond; the right of the plaintiff to enforce the same against a National Bank in a Court of equity; and the power and authority of the National Banks to execute such a bond, are directly involved.

Third.—The question of the right of this plaintiff, after it has voluntarily intervened by its petition in the Bankruptcy Court, and upon such petition impleaded the Trustees in Bankruptcy, and these Banks, upon a proceeding claiming the funds in the hands of the trustees, and asserting a lien thereon, to file this independent proceeding by bill in equity in the United States Circuit Court for the Northern District of West Virginia, is also directly involved.

Fourth.—The right of the plaintiff Guaranty Company to the injunction awarded it, because its bill had no equity to support the injunction, is also directly involved.

ARGUMENT

The ninth paragraph of the assignment of errors, Record 222, is: "It was error to dismiss the bill for want of judicial power, on demurrers, which go to the merits on general equity jurisdictions.

"On an appeal from an interlocutory order granting or continuing an injunction the appellate

court may direct the dismissal of the bill, where it is found to be without equity to support it."

Worth Mfg. Co., v. Bingham, (4th Ct) 54
C. C. A., 119; 116 Fed. 785, 6th headnote.

"Under the Act of March 3, 1891, c. 517, Sec 7, an appeal to the Circuit Court of Appeals from an interlocutory order or decree of the Circuit Court, granting an injunction and ordering an account, in a patent case, may be from the whole order or decree; and upon such an appeal the Circuit Court of Appeals may consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill."

Smith v. Vulcan Iron Works, 165 U. S., 518.

Justice Gray, in the opinion in this case at page 525, states the rule as follows:

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

It is the last paragraph of the law, as above quoted, which we invoke here.

We contend on behalf of the Banks that the only remedy which the plaintiff has as to the funds in the Bankruptcy Court, is that which it had already taken,

that is, the application to the Bankruptcy Court, direct, for relief. Surely it cannot be seriously contended that if the plaintiff is entitled to any part of the funds in the hands of the Trustees in Bankruptcy, that that court is not fully empowered to afford the plaintiff full and adequate relief. If we are correct in this position, it is then equally clear that the plaintiff cannot invoke the aid of the equity side of the United States Circuit Court to harass and implead these Banks upon a demand, which, if it has any foundation whatever, is purely a legal demand, by incorporating in its bill the pretence of enforcing its lien on the fund in the hands of the Bankruptcy Court.

THERE IS NO EQUITY IN THE PLAINTIFF'S BILL.

The Circuit Court, upon hearing on the demurrers should have dismissed the plaintiff's bill instead of awarding an injunction. The decree of dismissal by the Circuit Court of Appeals should be affirmed, not only for want of jurisdiction in the Circuit Court, but for want of jurisdiction by a court of equity to entertain the bill.

The agreement of indemnity claimed to have been executed by the bankrupt Evansville Contract Company to the plaintiff, is discussed in the bill. By reference to the first paragraph of the bill, we find that the plaintiff alleges that in its contract with the Government the Evansville Contract Company agree that in case of default by the Contract Company, the Government should have the right to take possession of the work and plant and prosecute the work to completion.

And the further allegation is that the Contract Company, in its applications to the Guaranty Company, stipulated that the plaintiff should be subrogated to every right of the Government.

It is here submitted that unless the Government did take possession of the work and plant and undertake to prosecute the work of completion, there could be no subrogation.

It is further alleged that the agreement of indemnity provided that in the event that the Contract Company should be unable to complete or carry on the work provided for, it would assign "and does hereby aassign" such plant as it may own or have upon said work to the said plaintiff.

A further allegation is made in the second paragraph of the bill that a certain per cent of the money earned from the Government should be by it retained until the work was completed.

The plaintiff claims in the third paragraph of its bill that by virtue of these bonds, or contracts of indemnity, it has a lien upon the plant of the bankrupt, and also a lien upon the funds in the hands of the Trustee.

Neither bonds nor indemnity contracts, or any provision thereof, creates a lien in favor of the Guaranty Company entitling it to enforce the same in a court of equity. So far as the percentage contract between the Contract Company and the Government is concerned, this court cannot, in any manner, divest the Government of this percentage, particularly in the absence of any con-

tract shown to exist between the Government and the bankrupt company, except so far as the bare allegation is concerned.

These contracts are purely legal in their nature, enforceable in a court of law. There are no grounds shown for the interposition of a court of equity.

Referring to the alleged bond, claimed to have been executed by the several Banks, we find the condition thereto to be as follows:

"Now therefore, if the above bound obligors shall and will in all respects indemnify and save harmless the said United States Fidelity & Guaranty Company from all loss, charge, damage, and liability heretofore accrued, or hereafter accruing, against it by reason of its suretyship, or liability, on said bonds, and on each of them, then this obligation to be void, otherwise to remain in full force and virtue."

This alleged bond is a pure legal document, if anything—enforceable only in a court of law. Before the plaintiff can maintain an action on this bond in any court, either law or equity, it must show that it has been damaged, or sustained loss, by virtue of the pretended contracts mentioned in the several "whereas" paragraphs preceeding the condition.

There is no allegation in the bill that the plaintiff has had any money to pay for the bankrupt company, nor is there any showing whatever in the bill which, upon the allegations thereof, would entitle the plaintiff to recover agaist these defendant Banks as the surety of the bankrupt.

In American Bonding & Trust Company, of Baltimore City, v. Logansport etc., Gas Company, 95 Federal Reporter, 49, the syllabus is as follows:

"A surety on an undertaking given to procure a temporary injunction cannot maintain a suit in equity against the principal in the nature of a bill of quia timet, to require indemnity against the risk assumed, where he has paid nothing on account of it, and the suit in which the undertaking was given is still pending on appeal and undetermined, until which time there is no liability on the bond on the part of either principal or surety."

If the plaintiff has a lien upon the funds in the hands of the Trustee, it has an adequate, ample and complete remedy under the National Bankruptcy Act, to enforce this lien in the bankruptcy proceedings.

Subdivision "d" of Section 67, National Bankruptcy Law, is as follows:

"Liens given or accepted in good faith, and not in contemplation of, or in fraud upon, this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

If the plaintiff had a lien against the plant of the bankrupt its remedy is not by bill in equity in the Circuit Court, but by proof of its claim in the Bankruptcy Court.

The general doctrine as to suits in equity in guaranty insurance cases is stated in Section 211, Frost on Law of Guaranty Insurance, in substance, to be that equity will only entertain a bill in cases of this character where it is necessary to settle long and complicated accounts. There is nothing of this character in the bill demurred to.

In the case at bar the last clause of paragraph 12 of the bill not only does not raise the question of complicated accounts,—but, on the contrary, alleges that these labor claims having priority, and material claims with priority, are unquestioned.

The bill in this cause must be sustained, if sustained at all, as a bill in equity upon guaranty insurance.

In Guaranty Company v. Mechanics etc., Trust Company, 80 Federal Reporter, 766, Judge Hammond delivering the opinion of the Circuit Court of Appeals for the Sixth Circuit, pages 771-2, states the law upon this question as follows:

"The next question is also one not raised by the parties, but one to which the court must refer. This is a bill in equity to recover on a contract of fidelity insurance. Equitable jurisdiction was asserted in the bill on the ground that the determination of the liability of the defendant involved the examination of a complicated account, not conveniently to be examined in a court of law, and also on the ground that there were quite a number of credits to be allowed the defendant in the account, the proper mode of applying which required the action of a chancellor. A stipulation filed in the case above shows that both parties preferred the equity jurisdiction, and no objection is made to it in this court. It may be doubtful whether, if the point had been sharply contested by demurrer below, the equity of the bill could have been maintained. It is true that there is a concurrent jurisdiction of matters of account in law and equity. 1 Story Eq., Jur. Sec. 443. But it is laid down that where all the items of the account are on one side, and no discovery is asked, there is no equity jurisdiction. 1 Daniel Ch. Prac. 551; 1 Story Eq. Jur. Sec. 459; Fowle v. Lawrason, 5 Pet. 495. It is true that there are a few large items of credit, but it is not clear that they would make the account a mutual one, in the sense in which it is understood in equity. However this may be, we think it our

duty to proceed to consider the case on the merits, under the rule laid down by this court in Reynolds v. Watkins, 9 C. C. A. 273; 60 Fed. 824, and McConnel v. Society, 16 C. C. A., 172, 69 Fed. 113. * * * The feature of the complicated account is certainly present in the case at bar, and thus it is a class of cases cognizable in equity, and though in fact the defendants credit items are not numerous enough to make it strictly a case of mutual accounts, we think it within the rule which requires us to enforce a waiver of the question of equitable jurisdiction against a party objecting for the first time in the Appellate Court, and which a fortiori requires us to maintain the jurisdiction when, as in this case, no objection is made even here."

We submit therefore, that upon the question of guaranty insurance, upon which the bill must be held to be predicated, equity has no jurisdiction.

THE CIRCUIT COURT HAS NO JURISDICTION.

The bill is predicated wholly upon the theory that all these transactions are matters cognizable in, and growing out of, the bankruptcy proceeding. The jurisdiction of the Circuit Court, so far as applicable here, is fully embraced within the first paragraph of Section 23, National Bankruptcy Act, which is as follows:

"The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between Trustees as such and adverse claimants concerning the property acquired or claimed, by the Trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants."

This cause cannot be maintained unless it is to be considered as a controversy between M. J. Bray, Trustee, on the one part, and the United States Fidelity & Guaranty Company, on the other, as adverse claimants, concerning the property acquired, or claimed by the Trustee, and when we apply Section 23 of the National Bankruptcy Act, we find that by that Section the Circuit Court must have jurisdiction in the same manner, and to the same extent, as though there never had been any bankruptcy proceedings. This being true, then we find that this is a suit brought by a citizen of the State of Maryland against a citizen of the State of Indiana, in the Circuit Court of the United States for the Northern District of West Virginia,—and under the provisions of United States Statutes, cannot be maintained. Where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant.

U. S. Compiled Statutes, 1901, Volume 1, 508.

Viewing this case, therefore, in the light of a controversy between the plaintiff—a Maryland corporation—and Bray, Trustee, a citizen of and resident in the State of Indiana,—and keeping in view the fact that under the provisions of Section 23 of the National Bankruptcy Act, the Federal Circuit Court must have jurisdiction, regardless of any bankruptcy proceeding, it manifestly therefore, appears by the very terms of the Statute giving jurisdiction to the Circuit Court in bankruptcy matters that that court can have no jurisdiction of this bill owing to the fact that neither the plaintiff nor the defendant,

Bray, Trustee, are citizens of the district wherein this suit was brought.

Further, in connection with the question of a suit in equity on the bond of indemnity, we refer the court to the tenth paragraph of the bill, wherein the allegation is made that the bankruptcy court fully determined the nature, amount, and holders of the so-called prior claims, and this being true, under the authorities which we have cited, there can be no grounds for intervention in a court of equity.

There is no jurisdiction conferred upon the Federal Circuit Courts by the National Bankruptcy Act for the settlement of Trustee's accounts. On the contrary, general order in Bankruptcy, Number 17, last paragraph, expressly prescribes that all accounts of trustees shall be referred as of course, to the Referee for audit, unless otherwise specially ordered by the court.

The duties of the trustee are fully and explicitly enumerated in Section 47, National Bankruptcy Act. It is therein expressly provided that trustees shall account for and pay over to the estates under their control all interest received by them upon property of such estate, collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of all the parties in interest.

It will be seen by inspection of General Order 17, and of Section 47 National Bankruptcy Act, that the settlements to be made by the Trustee are to be made in the bankruptcy court.

Referring now to the bill, particularly to paragraph 10 thereof, we find that the settlement by the Trustee is sought to be surcharged and falsified in the Circuit Court of the United States for the Northern District of West Virginia.

That court has no jurisdiction over the settlement made by the Trustee, and the District Court for the Northern District of West Virginia is the only tribunal wherein such settlement can in any manner be effected by judicial proceedings.

If the plaintiff has any claim or demand against the defendant Banks it has an adequate, ample and complete remedy at law in relation thereto.

If the plaintiff has any valid claim against the defendant Banks, such claim exists only by virtue of the alleged bond of indemnity of the several Banks, with the condition which we have heretofore recited.

It is claimed that this bond is predicted upon the agreement of indemnity alleged to have been executed by the bankrupt before its bankruptcy, and wherein there are recitals as to what should be the effect of a failure of the bankrupt company to execute its contract. The plaintiff claims by virtue of that contract of indemnity a lien against the plant of the Contract Company, as well as the right of subrogation, to any rights the Government had under its contract and bond with the Evansville Contract Company.

The bill on its face alleges that none of these rights have yet been determined; and further, that no money has

been paid by the plaintiff; but alleges that prosecution of certain suits against the plaintiff in the Courts of Pennsylvania, brought by material men, under the provisions of the contract and bond of the plaintiff with the Contract Company and the Government.

All these questions of loss, damage or injury to the plaintiff should be first fixed and determined, and payments made by the plaintiff, before it has any right to resort to a court of equity. Courts of equity will, under circumstances predicated upon equitable rights, entertain a surety upon a bill in equity against the principal, before payment of the liability. In case at bar no such equitable right is shown to exist.

In the alleged indemnity bond, claimed as a liability against the defendant Banks, the first clause of the condition recites that the Evansville Contract Company is a debtor to the obligor; that it had entered into four several contracts with the Government of the United States, covered by bonds to the Government, upon which plaintiff was surety.

The second recital is that after the work had been commenced by the Contract Company under the several contracts, the Contract Company was declared a bankrupt by the District Court of the United States for the Northern District of West Virginia.

The next condition recites the election and qualification of the Trustee in Bankruptcy.

The next recital is that at a meeting of the creditors of said bankrupt it was, upon the petition of said trustees

ordered that they should be authorized to conduct the business of the Evansville Contract Company, and finish the contracts, and for this purpose were authorized to borrow $75,000 and issue Trustee's certificates therefor.

Then follows the last recital which is in the following language:

"Whereas, the undersigned creditors of said bankrupt believe it to be to the interest of the creditors that such contract be finished by said Trustee, and that moneys be borrowed by the Trustees according to the order and decree of the bankrupt court, and the United States Fidelity & Guaranty Company is unwilling that that course should be taken unless it be indemnified against any liability that has accrued or may accrue, to it by reason of its being a surety of each of the bonds above mentioned."

Then follows the condition, already copied.

Before any action at law, or suit in equity, can be maintained upon this alleged bond the liabilities claimed by the plaintiff should be first determined by a court having jurisdiction to ascertain and determine such liabilities.

The liability contemplated by the obligors to this bond necessarily refers to the liabilities of the Evansville Contract Company to the plaintiff upon the bonds mentioned as having been executed to the Government, and upon which the plaintiff was surety. At the date of the execution of the so-called bond, the Evansville Contract Company was a bankrupt, and Trustees had been regularly elected and qualified by the proper proceedings taken in the Bankruptcy Court. The plant, against which the plaintiff claims a lien, by virtue of the National Bank-

ruptcy Act, passed to the Trustees, who took title thereto, subject to any liens legally existing against the same. And while section 23 of the National Bankruptcy Act would have given jurisdiction to the United States Circuit Court for the Northern District of West Virginia, to determine the right to this property as between conflicting claimants in cases where the necessary citizenship existed, yet so far as any liens against this plant were concerned, and all questions in relation thereto, by virtue of the bankruptcy of the Contract Company, vested alone in the District Court for the Northern District of West Virginia. That court alone has the right to determine the nature, amount and priority of these alleged liens, and as a condition precedent to maintaining a suit on the alleged indemnity bonds of the defendant Banks the liability of the plaintiff must necessarily first be established. Then, upon the establishment of such claim or liability, the bond of indemnity, if valid, could readily be enforced in a court of law. There is nothing on the face of the bond, or alleged in the bill in this cause authorizing the intervention of a court of equity.

The defendant Banks are corporations created under the National Banking Laws, and are not authorized to execute indemnity bonds.

The legal aspect of the alleged bond, in the aggregate penalty of $75,000 relied upon as indemnity by the plaintiff, the nature of the instrument, the character of the indemnity therein sought to be enforced, the nature of the work proposed to be carried on by the Trustees, and the allegations of the bill in relation to these matters, analyzed, are as follows:

(a) The Evansville Contract Company, a corporation under the laws of Indiana, and a debtor to the Banks, the obligors, had entered into four several contracts with the Government, and had given bonds for the performance of these contracts, and for the payment of all persons supplying labor or material in the prosecution of the work provided for in said contracts. On each of these bonds the plaintiff was surety.

(b) After the work had been commenced under each of said several contracts, and partially completed, the contract company, on February 27, 1904, was adjudged by the District Court of the United States for the Northern District of West Virginia, a bankrupt.

(c) On March 15, 1904, M. J. Bray, Alfred Heine, and C. D. Dotson were appointed Trustees of said Evansville Contract Company in the bankruptcy proceedings.

(d) At a meeting of the creditors of said bankrupt, on petition of the Trustees, it was ordered that the Trustees be authorized to conduct the business of the Evansville Contract Company, and to finish the contract theretofore undertaken by said bankrupt, and for that purpose were authorized to borrow money in an amount not exceeding $75,000, and to issue trustees certificates therefor.

(e) The obligors, creditors of the bankrupt, believed it to be to the interest of the creditors that the contract be finished by the Trustees, and that moneys be borrowed by them according to the order or decree of the Bankrupt Court, and the United States Fidelity & Guaranty Company, the plaintiff was unwilling that that course should be taken unless it be indemnified against any liability that had accrued, or might accrue to it by reason of its being a surety, on each of the bonds mentioned.

Then follows the condition.

"Now therefore, if the above bound obligors shall

and will in all respects indemnify and save harmless the said United States Fidelity & Guaranty Company, from all loss, charge, damage, and liability heretofore accrued, or hereafter accruing, against it by reason of its suretyship, or liability, on said bonds, and on each of them, then this obligation to be void; otherwise, to remain in full force and virtue."

Then follows a statement of the liabilities against the Evansville Contract Company in favor of the several Banks executing the alleged bond.

This bond bears date the fourth day of April, 1904. The seventh paragraph of the bill, makes clear what action the plaintiff took in the proceedings:

"7th. After the adjudication was made in bankruptcy the creditors of the bankrupt elected the said M. J. Bray, and also C. D. Dotson and Alfred Heine, Trustees; and these Trustees, in March, 1904, filed their petition before the Referee, George W. Johnson, copy of which is herewith filed as a part of this bill; and upon the hearing of the matters arising on that petition, and by authority of the creditors of the Contract Company, an order was entered on the 11th day of April, 1904, copy of which is filed, marked "D", authorizing the Trustees to conduct the business of the bankrupt, and to borrow money upon certificates to the amount of $75,000, issued by them, and to pay the premiums accruing to sureties *on bonds given to the government, and to perform and to complete the contracts existing between the bankrupt and the United States; 'to collect the contract price and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of the contracts.*"

"Your orator was the surety company referred to as the person to whom premiums should be paid, and who should be protected and saved harmless."

The fifteenth paragraph of the bill attempts to show

a consideration received by the Parkersburg Banks, or a benefit by these Banks derived, from the alleged contract of indemnity:

"15th. After your orator had accepted the indemnity bond of the defendant Banks, the said Farmers & Mechanics National Bank, and the Second National Bank, of Parkersburg, sold their respective claims, of $20,000, and $25,000 to the said Jacob Eichel at a large percentage of their face, and made assignments thereof at a time when such sales were made possible by reason of the profits expected to accrue from your orators permitting the performance of the Government contract. The said Eichel likewise acquired in his own name, or in that of his wife, the claims of all the other indemnitor Banks, who executed the bond of April 4, 1904; that is to say, the said Jacob Eichel was assignee in 1906 of the claims of the Citizens National Bank, of the First National Bank, and of the City National Bank of Evansville, and his wife Laura, was the pretended owner of the claims of the Farmers Bank of Rockport, and the First National Bank of Rockport, the claims of the two Banks last named having been prior to January 31,1905, assigned to the said Philip W. Frey, Counsel for the Trustees, as shown by his statements herewith exhibited marked "R" and "S".

"The said Laura and Jacob Eichel appeared, by power of attorney filed with the Referee, and dated December 1, 1906, to claim substantially all of the indebtedness of the bankrupt, excepting that of the Ritter-Conley Company, and of the Nicolette Lumber Co., as shown by exhibit "T".

Section 5136 United States Revised Statutes, contains the following provisions, which include all the powers conferred by law upon National Banks:

"Third. To make contracts."

"Seventh. To exercise by its Board of Directors, or

duly authorized officers, or agents subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promisory notes, drafts, bills of exchange, and other evidence of draft; by receiving deposits; by buying and selling exchange; coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

It will not be contended, seriously, that the defendant National Banks had authority to execute the alleged bond of indemnity. On the contrary, however, it will be maintained that the alleged sale of the claims of these Banks against the Evansville Contract Company to Jacob, or Laura, Eichel, was made possible by the action taken by the Bankruptcy Court upon the order entered providing for a continuation of the business of the bankrupt Company by the Trustees, such order having been procured from the plaintiff, as it alleges, upon the strength of the Banks' guaranty bond. But the Court did not act upon this so-called bond. And it will be further insisted, no doubt, that by reason of the sale claimed to have been effected by the Banks of their claims against the bankrupt, brought about, as the plaintiff alleges, by reason of the continuation of the business of the bankrupt, that the sale so made, and the consideration received from Jacob or Laura Eichel, on account of such sale, notwithstanding the original contract of indemnity may have been wholly illegal, estops the Banks from pleading the illegality of the contract of the bond of indemnity.

For none of the reasons alleged in the bill are these Banks estopped from denying the validity of the bond of indemnity.

The contract of indemnity is absolutely void, ultra vires, wholly unauthorized, in no manner incidental, what-

ever, to the business of banking. A contract of this character is void from the beginning, can neither be ratified subsequent to its execution, nor can any act under such contract be held to be an estoppel against these Banks from pleading at any time the invalidity of the pretended guaranty.

In California Bank v. Kennedy, 167 U. S., 362, the second point of the syllabus is as follows:

"The Statutes of the United States relating to the organization and powers of National Banks prohibit such Banks from purchasing or subscribing to the stock of another corporation, although they may, as incidental to the power to loan money, on personal security, accept stock of another corporation as collateral, and thus become subject to liability as other stockholders."

Then follows the third, or last, point of the syllabus, which is as follows:

"The want of such authority may be set up by a Bank to defeat an attempt to enforce against it the liability of a stockholder."

In McCormick v. Market National Bank, 165 U. S. 538, 549, the law is stated as follows:

"The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as the court has often recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; The interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. Pierce v. Railroad, 21 How., 441;

Pittsburg, Chicago, etc., Railroad v. Keokuk & Hamilton Bridge Co., 131 U. S., 371-384; Central Transp. Co., v. Pullman's Palace Car Co., 139 U. S., 24, 48."

In Concord First National Bank v. Hawkins, 174 U. S., 364, the syllabus is as follows:

"The investment by the First National Bank of Concord, New Hampshire, of a part of its surplus funds in the stock of the Indianapolis National Bank, of Indianapolis, Indiana, was an act which it had no power or authority in law to do, and which is plainly against the meaning and policy of the statutes of the United States, and cannot be countenanced; And the Concord corporation is not liable to the Receiver of the Indianapolis corporation for an assessment upon the stock so purchased, made under an order of the comptroller of the currency to enforce the individual liability of all stockholders to the extent of the assessment. The doctrine of estoppel does not apply to this case."

The United States Supreme Court in McCormick v. Market National Bank, 165 U. S., 538, in stating the conclusions reached, at page 553, says:

"The lease sued on, having been executed by the defendant, contrary to the express prohibition of the Statute, which peremptorily forbids a corporation to transact any business unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever, except in perfecting its organization, the lease is void, cannot be made good by estoppel, and will not support an action to recover anything beyond the value of what the defendant has actually received and enjoyed."

The meaning of the language "what the defendant had received and enjoyed" is what the defendant received directly as consideration for the execution of the illegal contract. In other words, the Banks would not be per-

mitted to withhold from the plaintiff a cash payment made to it by the plaintiff as a consideration for the execution of the illegal contract, as such money would be recoverable, regardless of the existence of the illegal contract. However, in the case at bar the defendant Banks received nothing, either from the plaintiff or from the bankrupt Company. There could be no order for a restitution of money. Even if the defendant Banks received a percentage of their claims from Jacob or Laura Eichel such restitution would not inure to the benefit of the plaintiff, as neither it, nor the bankrupt paid any money to the Banks. Nowhere is there an allegation in the bill showing a direct benefit to the Banks, derived from the operations carried on by the Trustees under the order made by the Referee on April 11, 1904, which is claimed to have been procured by the execution of the indemnity bond. There is no basis for this claim. The business was authorized to be conducted without any regard to the so-called bond.

In California Bank v. Kennedy, 167, U. S., at page 371, the court says:

"The claim that the Bank in consequence of the receipt by it of dividends on the stock of the Savings Bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the Bank under the circumstances disclosed was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet, to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified. As was said by this court in Union Pacific Railway v. Chicago, etc., Railway, 163, U. S., 564, speaking through Mr. Chief Justice Fuller, (581): 'a contract made by a corporation beyond the

scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel."

In Bowen v. Needless National Bank, 36 C. C. A., 553, 94 Fed. 925, the Circuit Court of Appeals for the Ninth Circuit, in the syllabus to that case held the law to be:

"1. A National Bank has no power to lend its credit to any person or corporation, or to become guarantor of the obligations of another, except in the case of the transfer of promissory notes discounted, which is in the ordinary course of banking.

"2. A contract entered into by a corporation, which is ultra vires of its character, cannot be ratified or become binding on the ground of estoppel, and the only ground on which the corporation can become liable to the payment of money on account of such a contract which has been performed by the other party is that it has received a benefit or advantage thereby which it cannot justly retain."

"3. A National Bank advised plaintiff that it would pay all checks of a third person, although such person had no funds on deposit, as was known to both plaintiff and the Bank. In reliance on such promise, plaintiff cashed checks of such person, and transmitted them to the Bank for payment. The Bank issued and sent to plaintiff its drafts on a correspondent for the amount of the checks, which drafts were refused payment. Held, that the contract was one purely of guaranty, and was ultra vires on the part of the Bank, and the transaction gave plaintiff no right of action against it on the drafts."

Gilbert, Circuit Judge, delivering the opinion in the case above, at pages 556-7, says:

"But the present case is complicated by the fact

that the plaintiff in error relied upon the guaranty and cashed the checks on the strength thereof. There is authority for holding that under such circumstances the Bank is estopped to deny its liability on the guaranty, notwithstanding that the contract was ultra vires. Thompson Corp. Secs. 6017, 6025. State Board of Agriculture v. Citizens St. Ry. Co., 47 Ind., 407; Ins. Co., v. McClellan, 9 Colo. 11, 9 Pac. 771; Oil Creek & A. R. R. Co., v. Pa. Transp. Co., 83 Pa. St., 160; 'The principle properly understood and applied, extends to every case where the consideration of the contract has passed to the corporation from the other contracting party, which consideration may, on well understood principles, consist either of a benefit to the corporation or of a prejudice or disadvantage to the other contracting party. It is therefore not strictly necessary to the proper application of the principle that the corporation has received a benefit from the contract, but it is sufficient that the other party has acted on the faith of this, to his advantage; as where he has expended money on the faith of it.' Thomp. Corp. Sec. 6017. It is contended that this doctrine finds support in the language of decisions of the Supreme Court, as in Hitchcock v. Galveston, 96 U. S., 341, 351, where it was said * * * *

Having pointed out in the opinion the cases, and the circumstances, wherein, although the contract may have been ultra vires, yet a defendant would not be permitted to take advantage of the illegality of a contract to the extent of the benefits received, Judge Gilbert then goes on to show that this doctrine, in a case where the contract is void from the beginning, is not sanctioned or approved by the Supreme Court of the United States.

At page 557, Judge Gilbert says:

'While the language of these expressions of the court may be said to be sufficiently broad and conclusive to justify the contention of the plaintiff in error, the court, in its adjudications, has limited the application of

the principle to cases in which a corporation has, by the plea of ultra vires, sought to retain unjustly the fruits of a contract which has been performed by the other party thereto. In all such cases the action has been maintained, not upon the contract, nor to enforce its terms, but upon an implied obligation resting upon the defendant resulting from the fact that it has received money or property which it ought either to return or make compensation for."

Applying the principles stated above to the case at bar, what would be the measure of a recovery in favor of the plaintiff against the Parkersburg Banks, arising out of the transaction in relation to the indemnity bond?

These Banks received no benefit whatever from the carrying on of the business by the Trustees. The Bankruptcy court in no manner benefitted the Banks; they received no money from the bankrupt estate, nor did the plaintiff pay to the defendant Banks any money, or deliver to them any property. What they received was paid to them by Jacob or Laura Eichel. This was a purely speculative transaction—had no connection whatever with the indemnity bond, nor was the payment in any manner brought about by any act of the plaintiff.

A Court could not direct restitution to be made by these Banks to the plaintiff. The plaintiff has parted with nothing that has been received by either of these Parkersburg Banks.

There is no possible method of recovery in favor of the plaintiff against these Banks, except upon the contract itself. And this contract, being absolutely void in the language of the Supreme Court, is incapable of enforcement.

At page 588 of the case above cited, Judge Gilbert says further:

"These citations sufficiently illustrate the ground, and the only ground, on which the Supreme Court has held that corporations may be liable to the payment of money on account of contracts which they have entered into ultra vires of their charter, which have been performed by the other party to the contract. The right to relief in such cases rests upon the fact that the defendant corporation has obtained an advantage which it cannot justly retain. The general doctrine by which the present case may be ruled, is thus stated in the language of the court, in Central Transp. Co., v. Pullmaan's Palace Car Co., 139 U. S., 24, 59:

'A contract of a corporation, which is ultra vires in the proper sense,—that is to say, outside the object of its creation, as defined in the law of its organization and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

Further, it is held in this same case in the opinion, as follows:

"It was argued on behalf of the plaintiff that, even if the contract sued on was void, because ultra vires and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument though sustained by decisions in some of the States, finds no support in the judgments of this court."

The pretended contract of guaranty is absolutely void, and is incapable of being enforced in any proceeding, either at law or in equity.

It does not appear from the bill and proceedings in this cause that these defendant Banks have received any benefit, of any character whatsoever, as a result of the execution of the pretended guaranty bond, or from the bankruptcy proceedings, or estate, in any form or manner whatsoever. The whole object was a purely speculative one, and it has resulted, as such speculative cases usually do, in an almost total loss of assets. These Banks never received from the bankrupt estate dividends on their claims, derived from the operations carried on by the Trustees under the order of the Bankruptcy Court of April 11, 1904; therefore there is no ground for the claim that these Banks cannot allege the invalidity of the indemnity contract of April 4, 1904. The bill on its face wholly fails to show any benefit derived by the Banks from the bankrupt estate.

How can it be claimed that the money, if any, paid by the Eichels, to the Banks as purchase money for these debts due the Banks from the bankrupt, should be turned over to the Guaranty Company?

The alleged indemnity bond is ultra vires. The only recovery that could be had thereon would be a recovery for the amount of the benefits which the Banks received from the alleged contract of guaranty.

Had there been a dividend paid to these Banks upon their debt against the Evansville Contract Company out of the assets of the Bankrupt derived directly from the al-

leged bond of indemnity, there might be some pretense for an action. But in order to constitute grounds for such action the benefit received by the Banks must necessarily have been received from the Bankruptcy Court, and further, must have been produced directly by reason of the contract of indemnity. As an example, if moneys had been paid to these banks by the Trustees derived from the business carried on by the trustees under the order of the Referee, made April 11, 1904, and which moneys were the direct product of the indemnity bond of April 4, 1904, and which moneys, except for said bond of indemnity, would have gone to the credit or benefit of the Guaranty Company, the plaintiff, then although the indemnity bond would have remained ultra vires, yet under the conditions here supposed, the Guaranty Company might maintain an action—not for the penalty of the bond, nor for damages caused to it by reason thereof—but wholly and solely for the amount of money received by the Banks directly from the execution of the ultra vires bond. This is the extent to which any recovery can be had against a National Bank for an ultra vires act, such as the execution of the pretended indemnity bond of April 4, 1904.

Peoples Bank v. National Bank, 101 U. S., 181.
Bowen v. Needless Nat. Bank, 94 Fed. Rep., 925; 36 C. C. A. 553.

American Nat. Bank v. Nat. Wall Paper Co., 77 Fed., 85; 23 C. C. A. 33.

There is no pretense whatever that the Banks ever received any money, or other benefit, from the estate that can be pleaded as an estoppel. The sale to the Eichels of the debts of the Evansville Contract Company, due to

the Banks, as alleged in the plaintiff's bill, constitutes no part of the transaction in reference to the ultra vires act —the execution of the so-called indemnity bond. There is no connection whatever between the sale so made to the Eichels and the transactions in relation to the indemnity bond.

A National Bank has the right to plead its want of power, that is to say, to assert the nullity of an act which is ultra vires.

California Bank v. Kennedy, 167 U. S., 362.
Concord First Nat. Bank v. Hawkins, 174 U. S., 364.

In Merchants Bank of Valdosta v. Baird, 160 Fed. 642; 90 C. C. A. 338, it was held:

"An act of a National Bank void because ultra vires, cannot be made good by estoppel."

Hook, Circuit Judge, delivering the opinion, pages 645-6, Fed., says:

"A National Bank may warrant the title to property it conveys, or become liable as an endorser or guarantor of notes or other obligations which it re-discounts or sells, because to do so is incident to the business it is authorized to transact, and to the disposition of property it has lawfully acquired. But it cannot lend its credit to another by becoming surety, endorser, or guarantor for him. It cannot, for the accommodation of another, endorse his note or guarantee the performance of obligations in which it has no interest. Such an act is an adventure beyond the confines of its charter, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. Commercial Nat. Bank v. Price, 82 Fed. 799; 27 C. C. A.,

171; Bowen v. Nat. Bank, 94 Fed. 925; 36 C. C. A., 553; Id, 87 Fed., 430. An act that is void because beyond the power of a National Bank cannot be made good by estoppel. McCormick v. Market Bank, 165 U. S., 538, 17 Sup. Ct., 433; 41 L. Ed., 817; California Bank v. Kennedy, 167 U. S. 362; 17 Sup. Ct., 831; 42 L. Ed., 198. It is urged that the National Bank profited by the transaction to the extent of exchange, and that it retained the benefit. It is difficult to find any profit to the Bank in these transactions. If there was any it was swallowed up in losses."

The incidental powers authorized to be exercised by officers or agents of National Banks under Section 5136 U. S. R. S., must be lawful powers, and must be necessary to carry on the business of banking; by discounting notes, drafts, bills of exchange, and other evidences of debt.

It cannot be seriously contended that the execution of the so-called indemnity bond was the exercise of a lawful, incidental power, and necessary to carry on the business of banking.

This lawful, incidental power, necessary to carry on the business of banking, is further qualified by the seventh paragraph of Section 5136 U. S. R. S., by limiting the exercise of such lawful, incidental powers, to those which are necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange; coin and bullion; loaning money on personal security; obtaining, issuing and circulating notes according to the provisions of the National Banking Act. Applying these provisions of the Statute to these enumerated sole, incidental powers conferred on National Banks, therefore, in order to make the act a lawful, incidental power, it must appear that

the execution of the so-called indemnity bond was an act necessary to carry on the business of banking by some one of the enumerated methods prescribed by the said section of the National Banking Act, that is to say: It must have been an act in connection with discounting promissory notes, drafts, bills of exchange, or other evidences of debt. No such transaction took place in connection with the execution of the so-called indemnity bond. There was no discounting or negotiating of any notes, drafts, bills of exchange, or other evidences of debt. There was no receipt of deposits as a consideration for such indemnity bond. There was no purchasing or selling exchange, coin, or bullion. There was no loaning money on personal security. There was no obtaining, issuing, or circulating notes, according to the provisions of the National Banking Act. The act was ultra vires, without any consideration whatever, and was wholly speculative, unauthorized, and necessarily absolutely void.

In Aldrich v. Chemical National Bank, 176, U. S., 618, in discussing the incidental powers of National Banks, Justice Harlan, at page 626, says:

"The business of the Bank is to lend, not to borrow; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of First National Bank of Charlotte v. Exchange Nat. Bank of Baltimore, 92 U. S., 122, 127, 'authority is thus given in the act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted,' these powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a Bank to incur liabilities in the

regular course of its business, as well as to become the creditor of others. Nor do we doubt that a Bank in certain circumstances, may become a temporary borrower of money."

National Banks, under Revised Statutes, Secs. 5133-5136, inclusive, where they actually receive money or other property under an illegal contract because ultra vires, may, in a proper proceeding, be compelled to turn over or account for such money or property. The remedy is not, however, by a proceeding for the enforcement of an illegal and ultra vires contract, but by a proceeding to compel the restitution of the money or property of another, obtained without authority of law.

Rankin v. Emich, 218 U. S. 27, 35

Citizens National Bank v. Appleton, 216 U. S. 196,205

Central Transp. Co. v. Pullman's Car Co., 139 U. S. 25, 60.

Pullman's Car Co. v. Transportation Co., 171 U. S. 138,151

The principles involved in the case at Bar fall strictly within the rules laid down by this court in the cases above cited.

The Guaranty Company, in case at Bar, seeks the aid of a court of equity to enforce an illegal contract because ultra vires. There is no pretense, whatever, that the Guaranty Company ever paid any money to the defendant Banks, or delivered any property to the

Banks, nor is there any allegation or showing made by the bill whereby this court can find that the Banks have any property or money in their possession or control that they should be compelled to disgorge; nor is there anything in the record which shows that these Banks ever received any property or money, or pecuniary benefits of any character whatsoever, either by virtue of the alleged contract of indemnity or by virtue of the alleged decree of April 11, 1904. On the contrary, the record discloses that these Banks were creditors of the bankrupt Contract Company, and that the Banks received neither money nor property from the Guaranty Company, or from any other source on account of the alleged transactions under the decree of the Bankruptcy Court, or by means or by reason of the alleged guaranty contract.

This court through Mr. Justice Peckham said, in Pullman's Car Company v. Transportation Company, 171 U. S. 138, 151:

"The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or to make compensation for it."

Applying this principle to the case at Bar, there cannot be enforced here an implied promise to make restitution, or compensation, for the reason that the Guaranty Company never parted with any property or money, under the alleged contract, nor did the Banks receive any property or money under the alleged indemnity contract. Consequently, there can be no implied promise to return money or property, or to make compensation for it.

The order of the Bankruptcy Court entered

April 11, 1904, was in no manner procured to be entered upon the strength of the so-called indemnity bond of the Banks. The Banks were not before the Court, had nothing to do with this order, but plaintiff claims that the order was procured by its consent.

The provision of the alleged guaranty bond, in the condition thereof, stipulates that the obligors shall indemnify and save harmless the Fidelity Company from all loss, charge, damage and liability theretofore accrued or thereafter accruing, by reason of the suretyship, or liability, of the plaintiff on the bonds of the bankrupt company. *This condition, on its face, is so palpably illegal as to need little argument. If a contract of this character should be upheld, then National Banks can act as Guaranty Companies in all cases, and pledge the Banks to a loss equal to all its capital stock, as well as the double liability provided for against stockholders.*

Another matter for the attention of the court is that the pretended indemnity bond bears date the fourth day of April, 1904. The bill alleges that the order entered by the Referee directing the Trustees to carry on the business of the bankrupt was entered on the 11th day of April, 1904,—a period of one week subsequent to the execution of the bond.

The seventh paragraph of the bill alleges that upon the petition of the Trustees, an order was entered by the Referee in Bankruptcy, directing the Trustees to collect the contract price, and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of the contracts. The plaintiff claims that it was the surety mentioned in this

decree. In the next paragraph, which is also in the record copy of the bill marked "seventh", it is positively alleged that this order was entered by the Referee in Bankruptcy upon a consent stipulation filed by the plaintiff. Therefore, it is made to appear by the allegations of this bill, that a week after the date of the bond the plaintiff Guaranty Company appeared before the Referee, and there signed a stipulation consenting that the Trustees should go on and execute the contract, and upon this stipulation secured an order of the court directing the Trustees to collect the contract price, and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of the contract, the said plaintiff being the sole surety on these bonds to the Government.

This order was procured upon the written stipulation and consent of the plaintiff, and the entering of this order which required the Trustees to fully and completely release the plaintiff and save it harmless upon its bonds, about which it is now complaining, the order having been procured by the plaintiff subsequent to the date of the bond, supersedes the terms and conditions of the alleged bond, and these defendant Banks had a perfect right, after the entry of this order by the bankruptcy court, to rely upon the effect thereof, and upon the requirements thereof that the Trustees should save harmless the plaintiff Guaranty Company. *It is not shown that the Banks had anything whatever to do with the entry of this order.* But the bill does specifically allege that it was procured upon the filing of a written consent stipulation of the plaintiff Guaranty Company. This being true, if the plaintiff has any grounds to complain, it is against the Trustees in the execution of the order

of the Court. This decree of the Bankruptcy Court providing for the indemnity of the plaintiff by the Trustees, wholly supersedes the alleged indemnity bond.

The alleged bond of indemnity is wholly void for want of authority of the National Banks to execute the same, and no action at law, or suit in equity can be maintained thereon. The defendant Banks cannot be chargeable with having received a benefit when it is manifestly apparent that they received nothing whatever from the bankrupt estate, and consequently, are not estopped, in any manner, from denying the validity of the bond. The alleged purchase of the claims of the Banks by the Eichels was a mere speculative contingent act, in no manner connected with the bankruptcy proceedings, and in no manner connected with the Guaranty Company, but was a simple transaction between a third party and the Banks which can, in no manner, be made the foundation of a recovery in favor of the plaintiff.

The decree entered by the Bankruptcy Court on April 11, 1904, and the alleged contract, Exhibit "E" with the bill, constitute a novation.

The alleged contract, Exhibit "E" is unilateral. In fact it is a mere proposition made and filed in the Bankruptcy Court to secure the decree, Exhibit "D."

By the terms of the alleged contract, Exhibit, "E", the plaintiff Guaranty Company makes the following consents directed to the Bankruptcy Court:

"First.—That the party of the first part will consent to the performance by the Trustees appointed in bankruptcy in the District Court of the United States for the Northern District of West Virginia, for the estate and

in the matter of said Evansville Contract Company, bankrupt—of the contracts between the said Contract Company and the Government of the United States, or its officers, in the said bond to be mentioned and set forth."

The only recital in the alleged contract of indemnity, as to the manner in which the Trustees in Bankruptcy were to execute the contracts of the bankrupt company with the Government, is as follows:

"Whereas: At a meeting of the creditors of said bankrupt, it was, on petition of the said Trustees, ordered, among other things, that the Trustees should be authorized to conduct the business of the Evansville Contract Company, and to finish the contracts theretofore undertaken by the said bankrupt, and for that purpose to borrow money in amount not exceeding Seventy-Five Thousand ($75,000) Dollars, and to issue Trustees' certificates therefor; and:

"Whereas, The undersigned creditors of said bankrupt believe it to be to the interest of the creditors that such contracts be finished by said Trustees, and that moneys be borrowed by the Trustees according to the order or decree of the Bankrupt Court, and the United States Fidelity & Guaranty Company is unwilling that that course should be taken, unless it be indemnified against any liability that has accrued, or may accrue, to it by reason of its being a surety of each of the bonds above mentioned."

So far, therefore, as the defendant Banks are concerned the only recital in the alleged bond of indemnity as to the execution of the contracts of the Bankruptcy Company by the Trustees is that just quoted; and there is nothing whatever in this bond, either expressly stated or that can be in any manner implied, that would authorize any charge whatever in the method of paying the Trustees by the Government. In other words, the

Banks had a perfect right to rely upon the retention by the Government of the percentages which the plaintiff in its bill alleges the Government reserved in its contract with the Evansville Contract Company. Nor is there anything expressly stated in the alleged indemnity bond, or anything from which an implication can be drawn, that the Banks ever intended that the Government should not retain all percentages, under the prosecution of the work by the Trustees, as was expressly provided for in the contracts with the Bankrupt Company.

The bill expressly alleges, in paragraph one that the contract company should be required to execute the usual penal bond, with the additional obligations that the contractor should promptly make payments to all persons supplying him or them with labor and material in the prosecution of the work provided for in such contract.

These defendant Banks, therefore when they executed the pretended indemnity bond, dated April 4, 1904, did not in any manner consent to any waiver of the rights of the Government to the strict performance of its contract with the bankrupt company, or with the Trustees; nor did the Banks consent, directly or indirectly, that the Government should not require of the Trustees payment to all persons supplying them labor and material in the prosecution of the work, as provided for in the bond and contract with the Government.

Now referring again to the alleged contract of the plaintiff with the defendant Banks, "Exhibit E" with the bill, the second consent therein set forth is as follows:

"Second.—The party of the first part will consent to the payment to the said Trustees of all moneys accrued and accruing under said contracts in the same manner and to the same extent that the said Evansville Contract Company would be entitled to receive the same if it had continued its business, and had continued to perform the said contracts."

Then follows the third stipulation of consent of the plaintiff Guaranty Company, which is a voluntary relinquishment by it of the right of the Government to withhold the necessary percentages and to insist upon the payment to the material men and laborers of all moneys due on account of material furnished and labor performed. The consent is in words as follows:

"Third.—The party of the first part will consent that under the orders of the said Bankrupt Court the said Trustees may borrow money and issue Trustees certificates therefor, to such an amount as the court may authorize and that moneys so borrowed, and the certificates so issued may be made a first lien upon the assets of the said bankrupt, and the party of the first part agrees generally that it will make and execute such consents, papers and writings as may be required of it as surety by the Government, to facilitate and to continue by the said Trustees the performance of the business and contracts of said Bankrupt, and to enable the said Trustees to prosecute and to finish such contracts and to enjoy all benefits that may flow therefrom and from the performance thereof."

There is nothing in the alleged bond of indemnity, or any condition or provision thereof, that authorizes the original surety, the plaintiff, to execute a release to the Government so as to enable the Trustees to receive the percentages reserver for the protection of material men and laborers. Nevertheless the plaintiff, by its alleged contract of April 11, 1904, voluntarily stipulated

and agreed that the Trustees should collect and receive from the Government and enjoy all benefits flowing from the contracts.

The bill alleges what the plaintiff did in relation to permitting the Trustees to take charge of the execution of the contracts, in reliance, as it claims, upon the validity of the so-called indemnity bond of the Banks. (Record 7, 8.)

"That bond making each Bank severally liable to your orator for such proportion of Seventy-Five Thousand Dollars (amount of certificates), as the claim of each Bank bore to the aggregate of their debts—was executed by each Bank by the due and formal action of its Board of Directors, for the purpose of protecting its own debt; and upon the faith thereof your orator allowed the Trustees to take charge of all of the contracts and all of the plant and material and property of the bankrupt, and of all funds in the hands of the Government; and your orator remained liable to the Government for the performance of the contracts, and to all persons furnishing material to the Trustees."

There is nothing in the bond of indemnity of the Banks that in any manner can be construed as an authority to the plaintiff to make any release of the percentages required to be held by the Government for the protection of the plaintiff; nor is there anything in said bond indicating, in any manner, a consent to the plaintiff to make any release of any condition of the bond in favor of the Government. The release of these funds by the plaintiff, and the permission by it given to the Government to pay over all moneys to the Trustees was a wholly voluntary act, neither authorized by the creditors, nor in any manner, expressly or impliedly, sanctioned by these Banks. In order to protect itself from loss or dam-

age, arising from the consent given in the third paragraph of the agreement, Exhibit "E", the plaintiff caused the provision to be entered in the decree of the Bankruptcy Court of April 11, 1904, which expressly conferred upon the Trustees the right to collect the contract price, together with all pertentages retained by the United States, and to fully and completely release and save harmless any and all sureties which may have guaranteed the completion of said contract.

Keeping in view now the important point that the socalled indemnity bond bears date April 4, 1904, and that the decree of the Bankruptcy Court bears date April 11, 1904, and that the so-called contract, Exhibit "E" bears date April 11, 1904, full justification is found for the last clause of the decree, which authorized, or attempted to authorize, the Trustees to collect all moneys, including percentages from the Government, based, as that provision of the decree evidently was, upon the consent of the plaintiff Guaranty Company given in its so-called contract of April 11, 1904, and which consent gave to the Trustee the full benefit of all moneys, including, of course, percentages, that might be due upon the completion of the contract.

There is nothing in any proceeding of the creditors, nor is there anything in the so-called bond of indemnity of the Banks, that ever authorized the provisions of the decree directing the percentages to be paid by the Government to the Trustees,—nor did the Banks in any manner consent to any release by the Guaranty Company of the retention of these percentages, or of the right of the Government to require the Trustees to pay for all

material and labor, as provided for by the original bond to the Government.

The consent given by the plaintiff Guaranty Company to the payment by the Government of these percentages was voluntary, and a novation. By the provision of the decree of the Bankruptcy Court of April 11, 1904, the Trustees were substituted as guarantors in place of these defendant Banks. For these reasons, the Banks as sureties are wholly relieved of any obligation whatever.

According to the provisions of the so-called indemnity bond the Trustees would simply take the place of the Evansville Contract Company, and under this arrangement the Government held back the percentages which would fully protect the original surety, and the Government would further protect the material men and laborers, and without a release by the surety of these percentages, and these conditions of the original bond, there was ample provision for the full protection of the plaintiff,—and therefore, there would have been no liability against the Banks by reason of the pretended guaranty bond, and if it is construed to be applicable to the material men and laborers, then in such case, by the release of these funds and conditions of this bond by the Guaranty Company to the Government, which release was without sanction, procurement, or consent of the Banks, these Banks were deprived of the benefit of all these funds and conditions, and by this release the plaintiff has absolved the Banks from any and all liability.

"Any material alteration in, or deviation from, the terms of the contract for whose performance the surety

is bound will, if made without his consent, release him from his obligation."—27 A. & E. Ency. Law. 494.

Coughran v. Bigelow, 164 U. S., 301.

U.S. v. McIntire, 111 Fed. Rep., 590.

Brown v. Bank, 112 Fed. Rep., 901.

"One of the most vital applications of equitable principle in the law of discharge is found in the rule which prevents the creditor from increasing the surety's risk by an improper disposal of securities. It may be stated as follows: If a creditor without the consent of the surety parts with or renders unavailable any security or fund which he has a right to apply in satisfaction of the debt, the surety is exonerated or discharged to the extent of the value of such security or to the extent of the impairment in its value. This principle is a corollary from the equitable doctrine underlying the surety's right of subrogation, and the law of the subrogation therefore both supplies a means of testing the fact of discharge and defines its extent. The creditor is treated as a trustee of all securities in his possession, for the indemnity of the surety, as well as for its own protection; and he is in equity bound to apply them to the advantage of both. Accordingly, if the creditor who has the means of satisfaction in his own hand choose not to retain it and surrenders it to the principal debtor or allows it to pass out of his own hands, or for a consideration agrees to do so ,or negligently impairs its value, or loses control thereof, so that the right of the surety to be subrogated, should he at any time choose to pay off the indebtedness, is lost, the surety is discharged to the extent of his actual damage."—27 A. & E. Ency. Law, 516-17.

The rule above stated is so universally understood and applied as to need no further citation of authorities.

The Banks had a right to rely upon a mere substitution of the Trustees for the Evansville Contract Company. So far as this record discloses they never made

any consent to any impairment of the original agreement and bond, to which they would have been entitled to subrogation, to the extent of the percentages held by the Government, and to the extent of the right of the Government to require material men and labor to be paid.

It is not at all clear that the bill predicates the right of recovery against the Banks upon the existence of certain claims in favor of labor and material men, and further, it is doubtful on the face of the vague, indefinite and uncertain allegations of this bill whether the plaintiff doe snot rely upon the effect of the so-called Trustees' certificates, authorized by the decree of April 11, 1904.

And further it is suggested that the intentions of the parties were as to any guaranty to the plaintiff that this guaranty should be as to the lien given the Trustee's certificates.

The true construction of the so-called indemnity of the Banks is that it was intended thereby simply to guarantee the plaintiff, as the original surety of the Evansville Contract Company, against any loss that it may sustain by reason of giving the prior lien to the Trustees' certificates.

That is to say, in the event that these certificates should not be paid by the Trustees, and that necessity should arise for the enforcement thereof by innocent purchasers, against the plant and property of the bankrupt estate, the Banks, if liable at all, would be liable only to the extent that the enforcement of these Trustees' certificates would impair the right of the

plaintiff to have the material men paid out of the funds in the hands of the Bankruptcy Court. If this is the true construction to be placed upon the alleged guaranty bond of the Banks, then there is no liability against the Banks, for the reason that these certificates do not appear to have, in any manner, affected injuriously the rights of the plaintiff, even had it not released to the Trustees in consideration of their guaranty, set out in the decree of April 11, 1904, the right of the government to hold percentages and protect material men.

The borrowing of money by the Trustees and the issue of the Trustees' certificates therefore, in the aggregate sum of $75,000, for the purpose of carrying on the business was the only question objected to by the plaintiff before the Bankruptcy Court. The recital of the so-called indemnity bond in this regard is as follows:

"The undersigned creditors of said bankrupt believe it to be to the interest of the creditors that such contract be finished by said Trustees, and that money may be borrowed by the Trustees according to the order or decree of the Bankrupt Court, and the United States Fidelity & Guaranty Company is unwilling that that course should be taken unless it be indemnified against any liability that has accrued or may accrue, to it by reason of its being a surety of each of the bonds above mentioned."

The penalty of the bond is in the sum of the aggregate amount authorized to be borrowed upon Trustees certificates. It follows, that the matter which the parties had in view as to the guaranty was solely the question of the Trustees' certificates.

Whatever the law may be as to issuing Trustees', or Receiver's, certificates by courts, for the purpose of

carrying on the business of private corporations, in proceedings other than those in bankruptcy cases, we most confidently submit that National Banks are wholly without authority to guarantee any such certificates in any proceeding, either bankruptcy, or otherwise. There is no authority, by consent or otherwise, to be found in the National Bankruptcy Act, for issuing these Trustees' certificates; and no consent given by any of the parties can bind the Banks, in any manner whatsoever, in relation to any guaranty of the validity thereof, or the effect of issuing such certificates.

It is beyond the scope, power, or authority of National Banks to execute such a bond. And, taking the allegations of the bill as a whole, the total invalidity of the so-called guaranty bond is distinctly made to appear. And not only is this true, but it likewise as distinctly appears that subsequent to the date of the so-called guaranty bond the plaintiff voluntarily made a totally different contract, to-wit, on the 11th day of April, 1904, by which contract it released the surety held by it, and to which these Banks would have a right to resort in case a legal liability were established against them.

The decree of April 11, 1904, Exhibit "D" with plaintiff's bill, Record 23-26, inclusive, has been held by the Circuit Court of Appeals for the Fourth Circuit, to be incapable of enforcement, for the reason that such decree was not authorized by the Bankruptcy Acts.

The Circuit Court of Appeals for the Fourth Circuit, on November 5, 1908, held that the identical decree sought to be enforced in equity in case at bar was a de-

cree entered without authority of law, and declined to give relief to the Referee, save and except as to such portions of the decree as had been fully executed.

Bray v. Johnson, 166 Fed. 57,60, 61; 91 C. C. A. 643.

The bill of the United States Fidelity & Guaranty Company predicates its right to recover against the two Parkersburg National Banks, solely upon the alleged bond, which it claims it exacted from the Banks as a condition precedent to its consent to the entry of said illegal order. The bill at page 7, Record, contains the following specific allegations:

"Your orator then claimed, and now charges, that when the bankruptcy occurred your orator had the right to take charge of that work, and to take hold of the plants of the bankrupt, and to receive and retain percentages from the Government, and thus protect itself by completing each contract; and your orators charge that it could by efficient management have fully completed every contract without loss. After some negotations it was agreed that indemnity should be furnished to your orator by a few of the responsible creditors, and that several would execute an agreement of indemnity; and under date of the 11th day of April, 1904, an agreement was signed by your orator, expressing the understanding had—that upon the delivery by said Banks to your orator of a bond in the sum of $75,000, to indemnify your orator from all liability heretofore accured, or hereafter accuring against it, by reason of its suretyship on said four several bonds, then, (your orator agreed) as follows: First, to consent that the trustees in bankruptcy of the contract company should perform the contracts with the Government; Second, that the moneys in the hands of the Government accrued and accuring to be paid to the Trustees; Third, that the trustees may borrow money and issue trustees' certificates therefor, and that your orator would co-operate and execute all consents necessary to facilitate the performance of the contracts; and, fourth,

that the premiums on the bonds given by your orator should be paid."

It affirmatively appears from the foregoing allegations of the plaintiff's bill, that it is now seeking in a court of equity to enforce this bond, the execution whereof was an *ultra vires* act of the Banks. This so-called indemnity bond, the plaintiff procured from the Banks as a condition upon which it alleges it consented to, and really procured, the entry of the illegal order of April 11, 1904, which illegal order purported to confer upon the Trustee authority to continue the reckless and hazardous business of constructing Locks and Dams for the Government, and to borrow money, on wholly unauthorized trustees certificates upon which to carry on this perilous undertaking.

The plaintiff files as Exhibit "E" with its bill, Record pages 26-27, inclusive, what it alleges to be its consent to the entry of the illegal order of April 11, 1904. This alleged contract is unilateral. On its face it purports to be made between the plaintiff and certain Banks, including the two Parkersburg Banks. But these Banks are not parties to this contract. This so-called agreement, as a condition precedent to its alleged consent to the commission by the Bankruptcy Court, of the illegal act of continuing the business of the bankrupt Company, and of the entry of the illegal and wholly unwarranted order of April 11, 1904, stipulates for the execution by the different Banks of a bond in the penalty of $75,000, the execution of which bond, so far as the National Banks are concerned, calling for the performance of an *ultra vires act*, and which alleged bond, when executed, is wholly

void, as contrary to the authority given to National Banks by the National Banking Act.

The alleged contract, Exhibit "E" purporting, on its fact to require the execution by National Banks of illegal bonds as a condition precedent to the pretended consent of the plaintiff to the entry of the unwarranted and illegal order of the Bankruptcy Court, aforesaid, then proceeds to enumerate what it graciously *consented* that the Bankruptcy Court might illegally do, viz:

First: That United States Fidelity & Guaranty Company would "consent" to the performance by the Trustees of the contracts between the Bankrupt Company and the United States Government.

Second: That the United States Fidelity & Guaranty Company would "consent" to the payment to the Trustees of accrued and accumulating moneys under the contracts, in the same manner and to the same extent that the Evansville Contract Company would have been entitled to receive, if it had not become bankrupt.

Third: That United States Fidelity & Guaranty Company would "consent" and under the orders of the Bankruptcy Court the trustees might borrow money and issue trustees certificates therefor to such an amount as the court might authorize.

Every material provision of the alleged contract is predicted upon the execution of an illegal bond by the Banks,, as a condition to the plaintiff's *consent* to the entry of an illegal order by the Bankruptcy Court, authorizing the performance by the trustees of wholly

unlawful and illegal acts. And the plaintiff, by bill in equity, is now seeking to enforce by decree the performance of these unlawful and illegal acts.

The so-called bond, the subject matter of the bill in equity, is filed with the plaintiff's bill as Exhibit "F", Record 27 to 34, inclusive. The alleged bond, on its face, specifically predicates its existence upon the illegal order of the Bankruptcy Court of April 11, 1904, and the performance of the unlawful acts thereby attempted to be authorized to be performed by the Trustees and the Bankruptcy Court.

"ILLEGAL AGREEMENTS ETC.—*The maxim likewise excludes from a court of equity either party to an agreement tainted with any form of illegality, either to enforce it or to obtain relief against it, or one seeking to protect a right operating against public policy.*"

16 Cyc., 146-7.

In making application of the principal above stated, an analysis of the bill, as to conditions of the bankrupt Company at the time of its bankruptcy, and the condition of the Estate of the Bankrupt at the date of the institution of this suit, and the relationship of the plaintiff Guaranty Company to the bankrupt Company, is necessary.

In the third paragraph of the bill, Record, page 4, the plaintiff alleges that by virtue of the contracts of indemnity executed to it by the Evansville Contract Company, the plaintiff acquired a lien upon all of the plant and property in use by the bankrupt Company, at the several dams and constructions where the company was

operating. The plaintiff further alleges that it had acquired a lien upon all the funds and moneys earned by, or received from said contracts in the hands of the Government.

In the seventh paragraph of plaintiff's bill, Record, page 6, the plaintiff alleges that the liabilities of the Bankrupt Company for which it was surety, amounted to about $40,000.

In the fourth paragraph of the bill, at page 5 of the Record, the plaintiff alleges that the proceeds of the bankrupt Company's plant amounted to $64,000.

In the fifth paragraph of the bill the plaintiff alleges, Record 5, that the net amount of money in the hands of the trustees, at the date of the institution of this suit, was $26,000.

It is made to appear by the plaintiff's own showing that the plant owned by the bankrupt Company sold for $64,000; and that it had a lien against this plant for the $40,000, stated in the seventh paragraph of the bill as the liability under its guaranty bonds.

The plaintiff, by the allegations of its bill, shows that it had a lien on $64,000 worth of property, for the payment of $40,000 of liabilities; and that at the end of the operations carried on under the illegal order of April 11, 1904, there remained in the hands of the trustees only $26,000. And this suit is instituted against the Banks for the purpose of enforcing the alleged obligation claimed to have been created upon the alleged bond, by reason of the unfortunate losses sustained in the opera-

tions unlawfully carried on by the Bankruptcy Court.

In Setter v. Alvey, 15 Kansas, 157, it was held:

"The law will not assist either party to an illegal contract, and the parties being *in pari delicto*, it will leave them where it finds them. If the contract be still executory it will not enforce it, and if already executed it will not restore the price paid nor the property delivered."

2 Beach on Modern Law of Contracts,, 1852-3, Section 1415, states the law as follows:

"The authorities all agree that those contracts are illegal which rest upon a consideration that is fradulent against morality, or against the priciples of sound public policy, or in contravention of the provisions of some statute. * * * *"

The contract sought to be enforced by the bill in equity filed by the plaintiff in this cause is in violation of the National Bankruptcy Law, in violation of the National Banking Acts, and clearly against public policy.

The plaintiff in its bill alleges, that at the time of the bankruptcy of the Evansville Contract Company, it had a lien against the Company's plant to secure it against its liability of $40,000; and further alleges that this plant was sold for $64,000, further alleging that at the winding up of the transactions which, by its contract it procured to be carried on by the Bankruptcy Court, there only remained the sum of $26,000 as the result, not only of the sale of the plant, but of the operations unlawfully carried on by the procurement of the plaintiff.

There having been a great loss in these transactions

the plaintiff now seeks to make the stockholders of the National Banks, from whose officers it unlawfully secured the alleged indemnity bond, meet the losses sustained.

It would be clearly against public policy to sanction proceedings of this character. The attempt of the Guaranty Company to cast its losses sustained by the unlawful carrying on of the bankrupt's business upon the stockholders of the National Banks is an unconscienable demand, one clearly against public policy, and predicated upon illegal and unconscienable transactions.

In Wilson v. Spencer, 1 Rand. 76, the law is stated as follows:

"A court of equity, as well as a court of law, will interfere to prohibit the effect of contracts, made in violation of laws enacted for the public good."

In Helsley v. Fultz, 76 Va., 671, syl. 1 is as follows:

"It is a rule of courts of equity that they will not 'assist one wrongdoer against another'. If the agreement be executory, its execution will not be compelled nor its cancellation decreed. If it has become executed it will not be set aside and the fradulently conveyed property restored to the plaintiff. In all such cases parties will be left as they placed themselves."

The plaintiff seeks to avoid the effect of the illegal act by alleging and claiming that by reason of the pretended bond it waived its lien, which it claims to have held against the plant of the bankrupt Company. Whatever view the court may take as to the party actually suggesting, or bringing into being the illegal unauthoriz-

ed order of April 11, 1904, it is manifestly apparent from the plaintiff's bill, that it was an active factor in producing the results now complained of. The Guaranty Company was seeking to secure additional idemnity against its liability as surety to the Government on the bonds of the Evansville Contract Company. This was a speculative effort by the plaintiff through the agency of the Bankruptcy Court to better its condition as an alleged creditor. A court of equity cannot enforce the illegal contracts entered into for this purpose, but will leave the plaintiff in the condition in which it placed itself by entering into these unwarranted and unlawful contracts.

The bill is exhibited against the defendant Banks, and other persons therein named as defendants, for distinct matters and causes.

"A bill is properly dismissed, on demurrer, as multifarious, when it joins separate and independent matters, so distinct from each other that they are not the proper subject of attack in one suit."

Ziegler v. Ry. Co., 76 Fed., 662.

S. C. 22 C. C. A., 465.

The enumeration of distinct matters and causes appears at almost every page and paragraph of this bill. The plaintiff seeks a determination of the liability of the four separate bonds of the Evansville Contract Company.

The plaintiff also seeks the surcharging and falsification of the account of the Trustee, Bray, which, is only

cognizable by the District Court in the bankruptcy proceedings.

The plaintiff also seeks to have determined the claims, which, under the contract of the bankrupt with the Government, are required to be paid as preferences.

The plaintiff also seeks to cancel the contracts or transactions between the Trustee Bray and Mr. Frey.

A cancellation also of the transactions between the Eichels and the Trustees is sought.

Plaintiff also seeks to have refunded certain moneys which it claims were unlawfully paid out by the Trustee.

The bill also seeks the determination of the alleged liability of the defendant National Banks upon the alleged guaranty of April 4, 1904.

The bill, as framed, and the prayer thereof, seeks a full settlement of all matters in the bankruptcy proceeding, and, in fact, the Circuit Court is asked to assume the full and complete administration of the assets lawfully in charge of the District Court as a court of bankruptcy, and for which purpose there is a total want of jurisdiction in the Circuit Court.

The so-called bond of indemnity not only on its face undertakes to guarantee the surety company against future liability, but also on account of past liability. The sole object and purpose of this so-called indemnity bond was to indemnify the Guaranty Company against any injury that might be sustained by it through the issue

of the so-called trustee's certificates. There is no allegation in the plaintiff's bill that it has sustained any loss, incurred any liability, or been in any manner damaged by reason of the issuing of the so-called certificates. Consequently there is no liability made out by the allegations of the plaintiff's bill against the Banks which can be made the basis for a bill in equity. In other words, in order to establish a liability upon the so-called bond of indemnity, it would be necessary that the bill expressly allege that the plant of the Evansville Contract Company, against which the plaintiff claims to have had a lien by virtue of its bonds and contract of indemnity with the Evansville Contract Company, was sold, and the proceeds used in the payment of these so-called trustees' certificates, by virtue of the decree of April 11, 1904, which made these certificates a lien against the plant. Nothing of the kind is alleged in the bill. On the contrary, it is made to appear by the allegations of the bill that after the payment of the trustees' certificates, there remains in the hands of the trustee a fund aggregating practically $26,000.

So far as the funds in the hands of the Bankruptcy Court is concerned, the Circuit Court of the United States for the Northern District of West Virginia is without jurisdiction to in any manner affect. That fund, under the Constitution of the United States, and Acts of Congress in relation to Bankruptcy, is exclusively in the control of the District Court of the United States for the Northern District of West Virginia. The plaintiff, if it has any interest whatever therein, or lien of any character against, this fund can obtain all relief in relation thereto upon application to the Bankruptcy Court. The equity powers of the Circuit Court do not extend to any

control over or interference with this fund in any manner whatsoever. So far, therefore, as this fund is concerned the consideration of the sufficiency of the plaintiff's bill must be made out by the other allegations thereof. Considering the plaintiff's bill, therefore, upon its merits for the relief sought, aside from that affecting the fund, we find that it is based solely upon the so-called indemnity bond of the Banks. Eliminating the question of the fund in the Bankruptcy Court, it will not be contended that the United States Circuit Court for the Northern District of West Virginia has jurisdiction to enjoin proceedings at law instituted against this Baltimore corporation in the Courts of Allegheny County, Pennsylvania, by non-residents of the State of West Virginia. Nor can it be insisted upon any reasonable grounds that the Circuit Court of the United States for the Northern District of West Virginia has jurisdiction of the bill predicated upon the so-called indemnity bond against two corporations having their domicile in the Northern District of West Virginia, and a number of foreign corporations having their domicile and citizenship in the State of Indiana.

An examination of the so-called indemnity bond, Exhibit "F" with the bill, Record, pages 27-29, inclusive, conclusively demonstrates that all the parties to said writing, in any attempt to enforce the provisions thereof in a Court of Equity, would be necessary and indispensable parties to such suit or proceeding.

This is a suit instituted by a Maryland corporation against two corporations with their domiciles in the Northern District of West Virginia, and five corporations having their citizenship and domiciles in the State

of Indiana. The Circuit Court of the United States for the Northern District of West Virginia is without jurisdiction of the action.

Smith v. Lyon, 133 U. S., 315.

The position of the Parkersburg National Banks is:

First.—That the decree complained of should be affirmed, for the reason that the Circuit Court of the United States for the Northern District of West Virginia was without jurisdiction of the subject matter of the litigation; that the District Court, alone, was clothed with power and authority to distribute the funds in its control, the alleged object of the bill in this cause.

Second.—That the Circuit Court of the United States for the Northern District of West Virginia, as a court of equity, was without jurisdiction to award the injunction, or to entertain the bill, having for its primary object the enforcement of an illegal, because ultra vires, contract. Therefore, the bill, on its face being without equity, should have been dismissed.

V. B. ARCHER,

Attorney for Farmers & Mechanics National Bank of Parkersburg, West Virginia and Second National Bank of Parkersburg, West Virginia.

Office Supreme Court, U. S.
FILED.
DEC 11 1911
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

No. 111 OCTOBER TERM, 1911.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellant,

vs.

M. J. BRAY, M. J. BRAY, Trustee of the Evansville Contract Company, Bankrupt; JACOB EICHEL, LAURA EICHEL, et al.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for All the Appellees Except the Parkersburg Banks and Riter-Conley Co.

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SUMMARY OF FACTS.

The facts are sufficiently found in the opinion of the Circuit Court of Appeals to obviate the necessity for an extended statement thereof.

In brief, however, Laura Eichel claims by assignment from the original claimants about thirty-seven thousand ($37,000) dollars from the appellant, this sum

carrying interest from various dates prior to the bankruptcy of the Evansville Contract Company, which was adjudicated on the 27th day of February, 1904. (See fourth paragraph of bill, page 5 of Record.) Her claims now aggregate with interest upwards of fifty thousand ($50,000) dollars. She makes these claims against the appellant because of its suretyship on bonds given to the United States Government on certain river contracts, the original claimants being material men on the jobs.

The affairs of the bankrupt were settled except for distribution of a final balance in the hands of the trustees, which fund is now about twenty-seven thousand ($27,000) dollars. (See second paragraph of bill, page 4 of Record.) In August, 1907, Laura Eichel commenced her suits on her claims. She has sued in the Common Pleas of Allegheny County, Pennsylvania, at Pittsburgh. Shortly after that the Supreme Court of the United States decided that no matter what the size of the claim be the Circuit Courts of the United States have jurisdiction in such suits. She therefore dropped her suits in the Common Pleas and started similar suits in the Circuit Court of the United States at Pittsburgh. Service was obtained upon the appellant and the cases proceeded to pleas and some of them are at issue, as shown by the record in this case.

She seeks to recover, therefore, about fifty thousand ($50,000) dollars.

The appellant then went into the Circuit Court of the United States for the Northern District of West Virginia and sought to enjoin her from proceeding in the State Court and in the Circuit Court at Pittsburgh. Her cases in the State Court have not been discontinued and stand open.

APPELLEES' POSITIONS.

(1) The fund of twenty-seven thousand ($27,000.) dollars in the bankrupt's estate is in the custody and exclusive jurisdiction of the District Court in Bankruptcy. This position is fully covered by the opinion with authorities therein cited in the Circuit Court of Appeals.

This appellant is in the District Court asserting a lien (see Ex. N, p. 44 of Record), and can not now come into the Circuit Court, if it ever could.

Bryan vs. Bernheimer, 181 U. S., 196.

Judge Dayton held this: *In re Porterfield*, 138 Fed., 192.

The case of *White vs. Schloerb*, 178 U. S., 542, may be added—See a great number of Court of Appeals cases in *Remington on Bankruptcy*, p. 1092.

(2) The Circuit Court of the Northern District of West Virginia had no power to grant an injunction against proceedings in the State court at Pittsburgh. The Act of 2nd of March, 1793, Revised Statutes, Section 720, provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The appellant's demand in this case is that Laura Eichel be enjoined in her suits in the State Court at Pittsburgh, where she claims upwards of fifty thousand ($50,000) dollars, because, forsooth, the Court of Bankruptcy in West Virginia has a fund of about twenty-seven thousand ($27,000) dollars which appellant says should be applied to her claims. To state such a proposition is to answer it.

The authorities construing section 720 are gathered together in a note on page 509 of the 4th volume of Federal Statutes Annotated.

> "It is the settled doctrine of the United States Supreme Court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and no other court has the right to interfere with such custody or possession."
>
> *Re Johnson*, 167 U. S., 120; 17 Sup. Ct. Rep., 735.

(3) There is no practice which authorizes or approves an injunction by the Circuit Court of the Northern District of West Virginia against proceedings in the Circuit Court at Pittsburgh, when the proceedings at Pittsburgh have been started and the cases brought and pleas put in.

It is an incontrovertible proposition of law that one Circuit Court cannot enjoin proceedings already begun in another Circuit Court. Moreover, what power, or right, or reason, is there in the Circuit Court of the

Northern District of West Virginia to enjoin Mrs. Eichel's proceedings in the Circuit Court at Pittsburgh, because there is a fund of twenty-seven thousand ($27,000) dollars at Parkersburg? How would any litigation about the twenty-seven thousand ($27,000) dollar fund settle the fifty thousand ($50,000) dollar claim? Has not Mrs. Eichel the right to proceed to adjudicate her claims? If the appellant were successful in the Court of Bankruptcy, in having the twenty-seven thousand ($27,000) dollar fund distributed to Mrs. Eichel's claims, we will be very glad to get it, but how would that settle the balance of her claims? If for any reason the appellant should show that these claims do not belong to her it has that right in the court at Pittsburgh. We are compelled, under the principles of law applying, to admit for the purposes of argument all the averments of the plaintiff's bill no matter how unfounded they may be, but admitting all these, certainly Mrs. Eichel has a right to be heard in the court at Pittsburgh, where she brought her suits, and where the appellant has appeared.

Moran vs. Sturges, 154 U. S., 256.

Carson vs. Dunham, 3 L. R. A., 203, from the Mass. Supreme Judicial Court.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; and where the jurisdiction of a court, and the right of plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in an other court."

Peck vs. Jenness, 7 How., 612.

"The jurisdiction of a court once attached cannot be arrested or taken away by proceedings in another court."

Re Chetwood, 165 U. S., 433, 17 Sup. Ct. Rep., 385.

"Not only comity but public policy requires courts to refrain from exercising powers which would bring them into collision with each other, where the rights of suitors would be lost sight of in a useless struggle."

Harrington vs. Libby, 6 Daly, 264;
Mitchell vs. Bunch, 2 Paige, 620.

"After suits are commenced in one of the States, it is inconsistent with harmony that their prosecution should be controlled by the courts of another State."

Harris vs. Pullman, 84 Ill., 20.

(4) Our next proposition is that even if there is in the proper contemplation of the law a fund located in West Virginia, any adjudication on that fund would have no possible bearing upon Mrs. Eichel's claim to recover a personal judgment against the appellant, nor indeed would it have any bearing upon Jacob Eichel's claim, if he had one, to recover such judgment, or upon Bray's claim. The 8th Section of the Act of 1875 expressly provides: "But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the court therein, within such district."

On every point in this case, save the question of lien on the $27,000 fund, the appellants have the right of immunity from suit, save in their district or that of appellant if service can be made there. This is given them by the 1st section of the Act of 1875 as amended by the Acts of 1887 and 1888.

25 Statutes at Large, 434.

On the question of lien the court of bankruptcy and this court if need be will adjudicate.

The principle of law which underlies this proposition we do not find expressed in so many words in any decision of the Supreme Court. It is clearly expressed and applied by Judge Sanborn's decision in the Eighth Circuit, *Guardian Trust Co. vs. Kansas City Southern Ry. Co.*, 171 Fed., 43.

We quote from page 50:

> "This case falls far within the unquestioned rule that the pendency in a state or other court of an action *in personam* which involves no claim to or lien upon specific property in the possession or under the dominion of a national court of equity, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it."

This opinion cites *Stanton vs. Embry*, 93 U. S., 548, which is authority for the general proposition that pendency of a suit in a State court is not a bar to a suit in a Circuit Court of the United States upon the same cause of action, and the opinion gathers together

the leading cases in the Circuit Court of Appeals to support the text. These cases are as follows:

Standley vs. Roberts, 59 Fed., 836, 844, 8 C. C A., 305, 314.

Barber Asphalt Paving Co. vs. Morris, 66 C. C. A., 55, 58; 132 Fed., 945, 948; 67 L. R. A., 761.

Merritt vs. Barge Co., 79 Fed., 228, 233; 24 C. C. A., 530, 535.

Green vs. Underwood, 86 Fed., 427, 429; 30 C. C. A., 162, 164.

Hughes vs. Green, 28 C. C. A., 537, 539; 84 Fed., 833, 835.

Hubinger vs. Central Trust Co., 36 C. C. A., 494, 496; 94 Fed., 788, 790.

City of Ogden vs. Weaver, 108 Fed., 564, 568; 47 C. C. A., 485, 492.

B. & O. Ry. Co. vs. Wabash R. Co., 57 C. C. A., 322, 324; 119 Fed., 678, 680.

Ball vs. Tompkins (C. C.), 41 Fed., 486, 490.

Guardian Trust Co. vs. Kansas City Southern Ry. Co., 76 C. C. A., 615, 618; 146 Fed.

4*a*. No court can adjudicate rights *in personam* beyond its jurisdictional limits—the injunction was a nullity as to the Indiana parties.

Pennoyer *vs.* Neff, 95 U. S., 724.
Arndt *vs.* Griggs, 134 U. S., 316.
Galpin *vs.* Page, 18 Wall., 350.
Freeman *vs.* Alderson, 119 U. S., 185.
High on Injunct. (3rd ed.), sec. 33.

Yet the Circuit Court at Pittsburgh was controlled by it to avoid controversy. The judge who granted it was the judge of the District Court where the bankruptcy case is.

(5) Out of this fourth proposition comes the fifth. The full extent of the 8th Section of the Act of 1875 is, as quoted in our fourth proposition, to give the Circuit Court of the Northern District of West Virginia certainly nothing more than the right to adjudicate as to liens on this fund. Of course, we claim that it did not even have that right, but, admitting for the purpose of argument that jurisdiction, this Circuit Court can go no further than to warn the appellees that unless they come and submit to the further jurisdiction the court will determine liens. The Act gives the Circuit Court no jurisdiction or power whatsoever over the persons or property of these appellees, outside of any claim on the fund, and yet the appellant proposes that the Circuit Court shall adjudicate personal claims far beyond any fund in dispute.

NO FEDERAL QUESTION.

The consideration of the Act of August 13th, 1891, 28th Statutes at Large, 278, providing for suits on Government contractors' bonds, is not in question in this case, and the position of the appellant that it is is manifestly frivolous. The appellant claims no title, right, privilege or immunity under that Act. This is the test, as we have shown in our authorities cited on our motion to dismiss, page 9.

The appellant's other position that Section 23-A of the Bankruptcy Act is in question, is just as frivolous. That section provides that the Circuit Courts shall have jurisdiction of adverse proceedings between the bankrupt's estate and claimants, just as the Circuit Courts had before between the bankrupt and such adverse claimants. This point has nothing to do with the case. The sole point, as far as this matter is concerned, is the settlement of various claims by various creditors upon a fund in the hands of the Trustee in Bankruptcy and in the District Court. Some of the claimants allege that they have a preferred claim and some allege that they have a general claim. The appellant gets no right, title, privilege or immunity to sue the appellees in this case under Section 23. The sole question, as far as this branch of the case is concerned, is whether the Circuit Court has jurisdiction to take away from the District Court the settlement of the Bankrupt's Estate.

It is better anaylsis of the case to say that the vital point of the case at bar is not strictly one of jurisdiction at all. The essence of the case is "Is there any *res* in the Northern District of West Virginia upon which the appellant claims a lien which enables it to take the case into the Circuit Court?" The answer is "No; by your own showing you state yourself out of court. You aver that there is a fund in the Court of Bankruptcy upon which different sets of creditors are claiming liens. You are appearing in the Court of Bankruptcy asserting your right of lien. That court is competent to adjudicate your claim and you cannot go into another court with the same claim." The case, therefore, is the ordinary one of a dispute between cit-

izens of different states, and the plaintiff is merely and simply wrong because it has no cause of action.

Blythe vs. Hinkley, 173 U. S., 501.
Building Association vs. Price, 169 U. S., 45.
Smith vs. McKay, 161 U. S., 355.

RESUMÉ.

The appellant is claiming a right of lien on a fund of $27,000 in the hands of the trustee in bankruptcy of the Evansville Contract Co. Laura Eichel, whose suits were enjoined by the Circuit Court, does not deny that right of lien. Bray does not deny it. Bray, Trustee, does not deny it. The appellee banks do not deny it. They all have been contending for it and asking that the District Court in the bankruptcy case proceed to award the fund to these claims now owned by Laura Eichel.

It may be doubted whether the right of lien exists, because the surety, we think, waived any lien it had, by consenting to the property being taken and sold by the trustees, commingled, its identity lost and it is now impossible to trace any property upon which the surety had any original lien. And the surety did this because it relied (it says) upon the indemnity of certain banks (see p. 7 of the Record where the appellants' position is stated; Ex. F, page 27 of Record, and the 9th position of appellant in its brief on the motion to dismiss, p. 7).

As a matter of fact the appellant never had a right of lien on anything. It had a right it may be through the right of the United States to have the plant of the

bankrupt held for the finishing of the work and this was done. It may have had a right to proceed to finish the work. This it waived, depending, as it says, upon the indemnity of the banks. It may well be doubted whether appellant had a right to take the work out of the hands of the court of bankruptcy.

On November 19, 1904 (p. 39 of Record), the Referee decided that these claims were preferred, and Mrs. Eichel, when she brought the claims, unfortunately held this view. The first intimation appearing in the record of another view is when Capt. John G. Eigemmann, a large endorser for this bankrupt, notified the trustees that he took this position (see Ex. O, p. 50 of Record), and the trustees at once presented the matter to the Referee (see *idem*). This was done March 1, 1906. September 21, 1907 (Ex. N, p. 44 of Record), after Mrs. Eichel had brought her suits, the appellant petitioned the Referee to assert its claim as a lienor on this fund. From this time and indeed at all times Mrs. Eichel has been striving to have the Referee decide the question of lien, but as Judge Boyd remarks in his opinion, the practical effect of appellant's suit has been to stop all proceedings before the Referee. It has also effectually tied up the suits at Pittsburgh for four years.

The point is, here, that all parties in this litigation are in the District Court before the Referee alleging and claiming a lien on this fund. And the appellant has submitted itself to the District Court asking for a decree of lien. How can it now, even if it ever had that right, succeed in taking this lien controversy into another court?

And what does it matter if Jacob Eichel does now appear as owning some of the general claims against this estate, which it may be will get a small dividend if the Laura Eichel claims are not liens? His right rises no higher, but just as high as those of his assignors. Or if it be true that the appellant has any merit in its claim that Jacob Eichel agreed to buy up the so-called secured claims and see to it that appellant did not have to pay them, then the question of estoppel would arise in the distribution of the fund in the Court of Bankruptcy.

Suppose, as alleged on page 29 of the appellant's argument upon the motion to dismiss, Bray does own the Laura Eichel claims, is not Bray asserting and urging that these claims be allowed as preferred on the fund? Why, therefore, should another court be appealed to on the ground that appellant has a lien?

And on appellant's own showing Bray is not the owner.

There is but one way to unravel this tangle, and we have taken it. We urge and demand that the Referee proceed to determine the distribution of the fund. Mrs. Eichel demands the right to be heard on her claim that she is the owner of these claims. She chose her forum as she had a right to do and she has a constitutional right to a jury trial, which right can not be swept away by the vehement cry of appellant that Bray is the owner, which claim now fades away.

Let us suppose for argument's sake that he is the owner. Did not he not have a right to own them? He can not buy up claims, it may be, at a profit of the ex-

pense of the estate. Query, whether this would not be a matter for the general creditors only—How could it affect this surety? But he certainly has a right to claim in the distribution of the estate what he has paid for the claims. As a fact he did not buy them. His connection with the matter is clearly shown by Ex. L, p. 42 of the Record. He had a right to help Mrs. Eichel. Lest there be any question of his position he has tendered to the District Court an assignment to the estate of any profit he may have. See page 176 of Record.

It may be true that a party has the right in an adversary suit to contest a title of a bankrupt's trustee to property (*Frank vs. Volkommer*, 205 U. S., 521), and is not forced to submit himself to the jurisdiction of the Court of Bankruptcy. But here is a case where the appellant, Mrs. Eichel and Bray, *all* are in the Court of Bankruptcy asserting a lien or right and it is inconceivable that some other Court should take up the same matter. There is no adverse claim made against the trustee or by the trustee against a third party. The appellant is a creditor of the bankrupt's estate—claims it is liable to pay debts as surety of the bankrupt and claims the right to have this fund applied to the extinguishment of these debts, which are proved and on file (See Ex. 7, p. 56 of the Record).

Frank vs. Volkommer contains this language: The fund was deposited "*not in the general fund of the estate but as a special fund, etc.*"

The claim is that in the distribution of the bankrupt's estate as to this fund arising from the commingled and converted estate, a certain class of cred-

itors should be held preferred or lien creditors. If the proceedings were adverse to the trustee it would necessarily mean that in being successful the appellant would withdraw the fund from the estate and yet it certainly belongs to the creditors—either one class or the other.

Laura Eichel has a constitutional right to a trial by jury on her claims and she can not be deprived of this right by the Circuit Court.

> "In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action, only in which the defendants were entitled to a jury trial in the federal courts. Uniting with a demand for its payment, under the Statute of Mississippi, a proceeding to set aside alleged fraudulent conveyance of the defendants, did not take that right from them, or in any respect impair it.
>
> This conclusion finds support in the prohibition of the law of Congress respecting suits in equity. The 16th section of the Judiciary Act of 1789 enacted that such suits 'shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law,' and this prohibition is carried into the Revised Statutes, Sec. 723. It is declaratory of the rule obtaining and controlling in equity proceedings from the earliest period in England, and always in this country. And so it has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defend-

ant has a constitutional right to a trial by jury, but because of the prohibition of the Act of Congress to pursue his remedy in such cases in a court of equity.

All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the U. S."

Scott vs. Neely, 140 U. S., 106.

Moreover Laura Eichel had to sue or lose her rights by limitation or laches — not to let her claims grow stale

The appellee banks have this same right.

The purpose of the appellant in this litigation is not to assert its right of lien on a fund as allowed by the 8th section of the Act of 1875. It is to enjoin Laura Eichel in trying to get a claim *in personam*— to make the banks contribute on their indemnity bond—to deprive all of them of the right to a jury trial. The appellant's suit is a gross perversion of litigation away from its proper channels, conceived and carried on to delay and defer trials on the merits, and should visit upon appellant an imposition of a penalty meet in such cases by way of an allowance to appellees of a reasonable sum for expenses.

The prayer of the bill in the case at bar is for an accounting and finding what Bray, Jacob Eichel or Laura Eichel paid for the claims and that their rights be limited thereto—not only on the so-called preferred claims, but on Jacob Eichel's assigned general claims—what greater interference with the orderly proceeding of the Court of Bankruptcy could there be? The prayer proceeds, "for ascertaining the amount due for material and labor furnished under each and every bond." Is not that the business of a trial court on a suit on the bonds? Also it prays for a judgment against the banks fixing their liability.

The manifest purpose of the 8th Section of the Act of 1875 was to enable a court to fully adjudicate the right of all possible parties to a *res*, and as far as fixing a lien on the *res* the Circuit Court had this jurisdiction prior to the Act of 1875. All courts have the power to adjudicate rights to property within their jurisdiction —jurisdiction over *the res*, as distinguished from *the person*. The purpose of the act was to permit the removal of lien or encumbrance.

Moreover the act does not give the Circuit Court jurisdiction in such matter. It allows the party who has the right to sue, *i. e.*, has right of action, to bring it *in loco rei sitae*.

Scott vs. Neely, 140 U. S., 106.
Cates vs. Allen, 149 U. S., 457.
Hollins vs. Brierfield C. & I. Co., 150 U. S., 371.

Ingersoll vs. Coram, 211 U. S., 335, cited by appellant, and *Payne vs. Hook*, 7 Wall., 425, and *Byers vs. McAuley*, 149 U. S., 608, therein cited, establish the

very point we urge in this case: This is that it is not competent for the Circuit Court to make any decree *in personam* in a suit under the Act of 1875, sec. 8. The injunction in this case and about everything in this bill is *in personam*. In *Ingersoll vs. Coram* this point was waived (see 2d par. of the opinion).

As to the claim of lien the complete answer is that Congress has established the Court of Bankruptcy and given it exclusive jurisdiction of the determination as between different creditors of distribution of the general fund of the estate derived from the sale and conversion into money for distribution, this fund now being brought into Court.

But the appellant needs no such remedy to assert its lien a right to the fund. A competent and exclusive jurisdiction to do this is that of the District Court, where the appellant and all parties now are as actors asserting their rights. In fact the appellant nowhere in this case alleges that it needs any such remedy, or jurisdiction to claim or enjoy its alleged lien. What the appellant conceives and seeks is a judgment *in personam* against the appellees, over and above any claim of lien or the *res*. Like contention never was heard of.

WE MOVE THE COURT TO IMPOSE A REASONABLE SUM IN DAMAGES.

We believe this litigation, and particularly this appeal to the Supreme Court, was for delay only. The appellant here has tied up the settlement of the Estate of the Bankrupt as well as the claims of Laura Eichel for over four years, and if we are correct in our analysis of

this case and affirmance of the decree follows, there is nothing to prevent the appellant, as regards Laura Eichel's claims, from starting afresh in the Circuit Court at Pittsburgh, to raise on the equity side of that court its contentions, no matter whether they are good or bad. It is there, if any place, that its contentions must be raised, and this four years of time has been an absolute delay, not to speak of the expense. *Freeman vs. Howe*, 24 Howard, 450. We have gathered a number of the cases where damages have been allowed:

The Supreme Court may adjudge damages for delay on appeals as well as writs of error.

(U. S. Sup., Mich., 1880), *Gibbs vs. Dickma*, 131 U. S. (Appendix) clxxxvi.

Where it appears that a case has been carried to the Supreme Court merely for the purpose of delay the court in affirming the judgment will grant damages to the defendant in error.

Prentice vs. Pickersgill, 73 U. S. (6 Wall.), 511.
Amory vs. Amory, 91 U. S., 356.
Sire vs. Ellithorpe Air-Brake Co., 137 U. S., 579, 11 Sup. Ct., 195.
Wilson vs. Everett, 139 U. S., 616, 11 Sup. Ct., 664.

Where, on a writ of error to the State Court, in an action for the balance due on machinery sold defendant, it is undisputed that the mill was built and equipped by plaintiff and accepted by defendant, and that the rulings of the trial court on evidence and instructions assigned as error were proper, it is obvious that the writ

was taken for delay and the judgment for plaintiff will be affirmed with ten per cent. damages under clause two of Supreme Court rule 23.

Gregory Consol. Min. Co. vs. Starr, 141 U. S., 222, 11 Sup. Ct., 914.

Error to the allowance of a merely formal amendment of the pleadings is evidently frivolous and intended for delay and the judgment in such case will be affirmed with ten per cent. damages.

Jenkins vs. Banning, 64 U. S. (23 How.), 455.

The trial court correctly held that a United States revenue stamp on a deed was sufficient in an action by the grantor for the balance of the price and the grantee brought error and delayed proceedings 2½ years. The grantee had it in his power to correct any mistake respecting the stamp at little expense. Held that he should be assessed ten per cent. damages under rule 23 allowing such damages if the writ of error should appear to have been sued out merely for delay.

Hall vs. Jordan, 86 U. S. (19 Wall.), 271.

Damages will be awarded where the appeal is taken for delay and is frivolous.

(U. S. Sup., Miss., 1881), *Whitney vs. Cook*, 131 U. S. (Appendix) cxcvii.

Damages will be awarded where it is evident that the appeal or writ of error has been sued out or taken for delay only.

(U. S. Sup., Ill., 1861), *Phelps vs. Edgerton*, 65 U. S. (Appendix) lxxi.

Where there is nothing in the record tending to show error in the judgment of the court below or to repel the conclusion that the writ of error was prosecuted merely for delay the judgment will be affirmed with ten per cent. damages under rule 23 of the Supreme Court.

(U. S. Sup., Tex., 1870), *Hennessy vs. Sheldon*, 79 U. S. (12 Wall.), 440.

Ten per cent. damages awarded to defendant in error under Supreme Court rule 23, clause 2 (3 S. Ct. XIII), on the ground that the errors assigned were frivolous and the writ was taken merely for delay.

(U. S. Sup., Utah, 1897), *Nelson vs. Flint*, 17 Sup. Ct., 576, 166 U. S., 276.

Respectfully submitted,

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